VOLUME III

TRANSCRIPT OF RECORD

1065

Supreme Court of the United States

OCTOBER TERM, [redacted] 1966

No. [redacted] 15

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., APPELLANTS,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

No. [redacted] 17

CALUMET HARBOR TERMINALS, INC., ET AL., APPELLANTS,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

No. [redacted] 20

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

NO. 445 FILED AUGUST 11, 1965
NO. 484 FILED AUGUST 23, 1965
NO. 543 FILED SEPTEMBER 7, 1965
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[fol. 4622] E. E. Foulks was sworn and testified as follows:

Direct examination.

By Mr. Guandolo:

Q. Will you please state your name?

A. E. E. Foulks.

Q. Where are you employed and in what capacity?

A. I am Assistant Vice President of the Operating Department, Chicago, Rock Island and Pacific Railroad Company, with headquarters in the LaSalle Street Station, Chicago, Illinois.

Q. Have you prepared a statement to be read into the record in this proceeding?

A. I have.

Q. Will you read your statement into the record, please?

A. I entered railroad service in June 1920, with the Santa Fe Railway, working as clerk and telegrapher at various stations on their territory south of Albuquerque, New Mexico. In 1922 I transferred to the Coast Lines portion of the Santa Fe's system which comprises the lines west of Albuquerque and Belen, New Mexico, serving as clerk, secretary to the Superintendent, telegrapher, agent, car distributor, train dispatcher, chief dispatcher, transportation inspector, trainmaster, Assistant Superintendent and [fol. 4623] Division Superintendent until March, 1942, when I was ordered to active duty with the U. S. Army and commanded a railroad operating battalion and a railway grand division of the Military Railway Service, Transportation Corps, in North Africa, Italy, France and Germany.

On returning to railway service, November 1, 1945, I was appointed Superintendent of Transportation of the Santa Fe system with headquarters in Chicago, which position I resigned in March 1952, when I was appointed General Superintendent of Transportation for the Rock Island Lines. I held this position until October 1, 1954, when I was promoted to my present position.

Mr. O'Brien: Mr. Examiner, on Page 2, I would like to have it understood that is expressed as his opinion, otherwise—and nothing more—we will have to object to it.

Exam. Albus: All right, continue.

The Witness: During the past years in which the Rock Island has served the Lake Calumet Port Area, the transportation needs of shippers and receivers have been met and the railroad is prepared to take care of their requirements for the future. Other railroads have had access by the Rock Island switching service to the Lake Calumet Port Area just as they have had access by switching carriers to all industries in the Chicago Switching District. This has been accomplished in all cases by way of switching service. Railroads will continue to reach the Lake Calumet [fol. 4624] Port Area in like manner. The fact that other railroads do not have direct access to the Lake Calumet Port Area and must reach it by way of switching arrangements will not hamper them in participating in the movement of traffic, will not retard or hinder the growth and development of the Port itself, will not retard the growth and development of the business of the shipping public through the port and of the territory which will be served through the port, and will not jeopardize the service afforded shippers and receivers. From a practical standpoint crews of only one railroad could switch in this area at a time. If more railroads were to serve the area the physical switching service would have to be alternated in some manner. This would only present employment problems to the carriers involved in the alternating of switching.

Waterborne Commerce of the United States, Calendar Year 1955, Part 3, Waterways and Harbors, Great Lakes, compiled under the supervision of The Division Engineer, North Central Divisions, Corps of Engineers, U.S. Army, is one of a series of five publications containing statistics on the waterborne commerce of the United States. These publications present data on the movements of commodities and vessels at the ports, harbors, waterways, and canals of

the United States and the territories and possessions, and each publication covers a complete geographical area. Part 3 of the series of five publications covers the Great Lakes. [fol. 4625] At pages 29 through 45 of Part 3, the Corps of Engineers has set out the ports, harbors, waterways, and canals situated within that the Corps classifies as the "Chicago, Illinois District", and as shown there both Waukegan Harbor, Illinois on the north and Gary Harbor, Indiana on the south are included as part of the district.

Under the classification "Port of Chicago, Illinois," the Corps has included Chicago Harbor, Chicago River (main and north branch), Chicago River (south branch), Chicago Sanitary and Ship Canal, Calumet-Sag Channel, *Lake Calumet,* and Calumet Harbor and River.

There is nothing unusual about this port area that requires service by more than one railroad. There are numerous port areas where a single rail carrier serves facilities for the handling of water borne freight. Here at the Chicago port, which for purposes of this part of my testimony embraces the waterfront metropolitan area of Chicago, there are a total of 164 such facilities, 138 of which are served by a single railroad. These facilities are listed in my first exhibit.

May Exhibit H-99 be marked for identification, entitled *Rail-Water Terminals within Chicago Switching District.*

Exam. Albus: It may be so marked.

(Intervener's Exhibit No. H-99, Witness Foulks, was marked for identification.)

The Witness: Exhibit H-99 shows:

[fol. 4626] (A) The Code number assigned to each facility by the Corps of Engineers, U. S. Army.

(B) The name and address of the operator.

(C) Whether the facility is active or inactive, and

(D) The terminal carrier serving the facility.

The location of these facilities we have shown on two charts of the Chicago area, prepared by Engineers of the U. S. Lake Survey, U. S. Army.

May I have Exhibits H-100 to H-101 marked for identification?

Exam. Albus: They will be so marked.

(Intervener's Exhibits Nos. H-100 and H-101, Witness Foulks, were marked for identification.)

The Witness: Exhibit H-100 shows the *Chicago Harbor, including North and South Branches of the Chicago River,* and Exhibit H-101 shows the *Calumet and Indiana Harbors, including the Calumet River, Lake Calumet and portions of the Sag Channel.* Upon the appropriate chart exhibit has been spotted the code numbers for the facilities listed in my Exhibit H-99, which could be identified within the confines of the chart; the charts are not embracives of the entire switching district.

The operators of the Rail-Water Terminals shown in my Exhibit H-99 are diversified as to enterprise; there are a total of 12 grain elevators, 10 of which are served by a single railroad.

A study of the situation, as applied to Public Grain [fol. 4627] Elevators at points within the Central Western Territory as served by the Rock Island as well as at the following points—Milwaukee, Wisconsin; Duluth, Minnesota; Superior, Wisconsin and Gulf ports of Port Arthur, Texas; Baton Rouge and New Orleans, Louisiana; and Mobile, Alabama, reveals that the greatest number of Public Grain Elevators are served by a single railroad, further the study reveals that of the total capacity (bushels) of the elevators embraced, the greatest capacity is reflected for elevators served exclusively by a single railroad.

Now, may I have Exhibit H-102 marked for identification?

Exam. Albus: It may be so marked.

(Intervener's Exhibit No. H-102, Witness Foulks, was marked for identification.)

The Witness: My Exhibit H-102 shows the Public Grain Elevators at points embraced within the study referred to, the name of the operating company, the owner of the elevator, the capacity and the rail line or lines serving the elevators. Pages 1-A and 1-B give a summary analysis of the elevators showing that of the 222 elevators, 169 or 76 per cent are exclusively served by one railroad. Page 1-C and 1-D give a summary analysis of the capacity of the 222 elevators, outlining that the total capacity is 608,109,000 bushels; of this total capacity 447,114,000 bushels or 73.5 per cent is represented by elevators served exclusively by a single railroad.

The situation at Chicago as a port is not unlike that [fol. 4628] existing at the port of Chicago; that is to say, where certain facilities, or certain areas, of the Port District are served by a single railroad.

The situation at some of these other Lake Ports are reflected by other Exhibits.

May I have Exhibit H-103 marked for identification?

Exam. Albus: It will be marked H-103 for identification.

(Intervener's Exhibit No. H-103, Witness Foulks, was marked for identification.)

The Witness: Exhibit H-103 is a chart of Milwaukee, Wisconsin, issued by the Corps of Engineers—U. S. Army —U. S. Lake Survey (1954) showing the waterfront facilities and industries, and the railroad which serve them. The coloring denoting railroad trackage has been added under my supervision and direction. Trackage in red is that of the Chicago, Milwaukee, St. Paul and Pacific Railroad; trackage in green that of the Chicago and North Western Railway; the combination colorings red and green shown on Jones Island, indicates trackage owned by the Milwaukee Harbor Commission and leased by both the Chicago, Milwaukee, St. Paul and Pacific and Chicago and North Western.

While each of these railroads serve all facilities and industries, switching these facilities at different times, on

Jones Island, they both serve exclusively large areas bordering on the water and over a far more extensive waterline than is involved in the case of the Rock Island at Lake Calumet Port.

[fol. 4629] Now, may I have Exhibit H-104 marked for identification?

Exam. Albus: Exhibit H-104 will be so marked.

(Intervener's Exhibit No. H-104, Witness Foulks, was marked for identification.)

The Witness: Exhibit H-104 is a chart of Erie, Pennsylvania also issued by U. S. Engineers of the U. S. Lake Survey (1956). It shows the waterfront facilities and industries as well as the railroads which serve them. The coloring of the railroads has been added. The color red depicts trackage of the Pennsylvania Railroad which serves all facilities and industries situated along several miles of waterfront. Only the Hammermill Paper Company is served by a railroad other than the Pennsylvania, namely the New York Central Railroad, colored in black. The trackage shown in orange is that of the New York, Chicago and St. Louis Railroad which does not reach the waterfront. Here again is the case where the waterfront area served by a single railroad covers a far greater stretch than is the case with the Rock Island at Lake Calumet, furthermore the Pennsylvania serves all port facilities at Erie, Pennsylvania contrasted with the Rock Island serving but one of the many waterfront facilities existing in the Chicago Port area.

May I have Exhibit H-105 marked for identification?

Exam. Albus: Exhibit H-105 will be so marked.

(Intervener's Exhibit No. H-105, Witness Foulks, was marked for identification.)

[fol. 4630] The Witness: Exhibit H-105 is a chart issued by U. S. Engineers of the U. S. Lake Survey (1956) for Oswego Harbor, New York. Like the other charts introduced it shows the waterfront facilities and industries and the railroads serving same. The coloring has been added.

The blue coloring denotes the trackage of the Delaware, Lackawanna and Western Railroad; red is that of the New York Central Railroad; and green that of the New York, Ontario and Western Railway. At the time this was prepared, the New York, Ontario and Western Railway was still operating. Then it discontinued operations. Here it will be seen long stretches of waterfront are served by a single railroad.

Now, may I have Exhibit H-106 marked for identification?

Exam. Albus: Exhibit H-106 may be so marked.

(Intervener's Exhibit No. H-106, Witness Foulks, was marked for identification.)

The Witness: Exhibit H-106 covers the port of Ashtabula Harbor, Ohio. This also is a U. S. Engineers Lake Survey Chart (1953) showing waterfront facilities and industries as well as the railroads reaching them directly. The coloring which has been added denotes the individual railroads. Blue is the trackage of the Pennsylvania Railroad and red that of the New York Central Railroad. It will be noted that the New York Central alone serves the extensive area east of Ashtabula River and the Pennsylvania Railroad alone [fol. 4631] serves the area west of the River. To the east of the New York Central tracks and on the waterfront but not indicated on the chart is a large waterfront development by N. J. Penny; dock facilities are contemplated for the handling of lake cargo traffic. This area will be served only by the New York Central.

May the next exhibit be marked for identification?

Exam. Albus: Exhibit H-107 for identification.

(Intervener's Exhibit No. H-107, Witness Foulks, was marked for identification.)

The Witness: Exhibit H-107 is a U. S. Engineers—U. S. Lake Survey chart of *Toledo Harbor, Ohio.* Like the other charts it shows waterfront facilities and some of the industries as well as the railroads which serve same. The coloring of the trackage, explained by the legend, has been added.

The situation at Toledo is not unlike the other port cities discussed except there are more separate areas served by individual railroads—namely, the Pennsylvania, in *purple;* the Wabash in *yellow;* the New York Central in *green;* New York, Chicago and St. Louis—*orange;* Baltimore & Ohio, *brown;* Toledo Terminal Railroad—*red;* and Chesapeake and Ohio in *blue.*

I know these particular ports are not the only ones where an individual railroad serves stretches of a port area—these specific ports were selected for illustrative purposes only.

To say that Lake Calumet Port, which is but one segment of the Chicago Port as a whole, will be hampered in any [fol. 4632] way because of terminal service by only one railroad would be tantamount to saying that other Great Lakes' ports, which I have visited, are suffering and will suffer because of terminal service by one railroad to segments of the ports. These maps show that the territories for future development of all of these ports, with rare exceptions, are pre-empted by individual railroads. Rock Island is favorably situated to give Lake Calumet Port the necessary service and is willing to do so in an impartial manner, thus there is no reason why the port should be hampered in its growth and development.

Even if we were talking about a Port as a whole rather than a segment of a port, it is unlikely that a single carrier operation would hamper the growth and development of the Port. This is borne out by the fact that at Port Arthur and Orange, Texas, where service is performed by only one rail carrier, the Ports have developed. Reports of the Chief Engineer, U. S. Army-Commercial Statistics Water-Borne Commerce of United States, Part 2, show,

(A) that Port Arthur, Texas in 1945 handled 12,292,646 short tons, whereas in 1955 the traffic had increased to 21,-577,533 short (2000 pounds) tons, an increase of 9,285,907 tons or 75½ per cent, and

(B) Orange, Texas in 1945 handled 170,217 short tons, whereas in 1955 the traffic had increased to 1,130,729 tons, an increase of 960,512 tons or 564 per cent.

[fol. 4633] At Port Arthur, Texas, which is served by the Kansas City Southern and the Southern Pacific, the Kansas City Southern Railway serves the dock facilities and switches traffic to or from the Southern Pacific upon a reciprocal switching basis. The Texas Company's Island plant is likewise served by the Kansas City Southern, and the Southern Pacific traffic is handled on a reciprocal switching basis; the Gulf Oil Company has its own wharf facilities and performs terminal switching with its own engine; both the Southern Pacific and Kansas City Southern deliver cars to this facility.

At Orange, Texas which is served by the Missouri Pacific and the Southern Pacific, the Port Facilities are owned by the City of Orange, the Missouri Pacific serving all of the port facilities, and switches traffic to and from the Southern Pacific through reciprocal switching arrangements.

* * * * * * *

[fol. 4641] Robert H. Anderson was sworn and testified as follows:

Direct examination.

By Mr. Bordes:

Q. Please state your name and occupation?

A. Robert H. Anderson, General Superintendent of Transportation, Rock Island Lines, Chicago.

Q. Mr. Anderson, have you prepared a statement that you would like to read?

A. Yes, I have.

Q. Would you read that statement into the record, please?

A. My name is Robert H. Anderson, my business address is 139 Van Buren Street, Chicago 5, Illinois, and I am em-[fol. 4642] ployed by the Chicago, Rock Island and Pacific Railroad Company as General Superintendent of Transportation.

My railroad experience is as follows:

November, 1926 to July, 1942 Santa Fe Railway Company as Clerk, Switch Tender, Switchman, Engine Foreman and Yardmaster.

July, 1942 to December, 1945, United States Army with the 713th Railway Operating Battalion and 704th Railway Grand Division as General Yardmaster, Assistant Trainmaster, Stationmaster and Trainmaster.

December, 1945 to March, 1952, Santa Fe Railway as Engine Foreman, Yardmaster, Assistant Superintendent of Transportation.

March, 1952 to January, 1956, Rock Island as Trainmaster, Assistant Superintendent, Superintendent and Superintendent of Transportation.

January, 1956 to date, Rock Island as General Superintendent of Transportation.

It is my duty to formulate freight train and passenger train schedules; distribute freight and passenger equipment for the entire railroad and assist the Vice President of Operations in the General Operation of the Railroad.

As General Superintendent of Transportation, I am in constant touch with the car supply on my railroad and direct distribution of empty cars on the railroad as between Districts and Divisions.

It is necessary that I keep acquainted with other rail-
[fol. 4643] roads' freight and passenger schedules so that our schedules and their schedules will dovetail.

It is my responsibility to keep abreast of all research and to take advantage of new types and designs of equipment as they are made available.

May I have Exhibit H-108 marked for identification?

Exam. Albus: Exhibit H-108 for identification.

(Intervener's Exhibit No. H-108, Witness Anderson, was marked for identification.)

The Witness: Exhibit No. H-108 is a map of the Rock Island Lines showing the terminal and on line interchange points and total operated track mileage of 11,317, as of June 1, 1956. This map was prepared for me, and under my supervision, by The Office of Chief Engineers of the Rock Island, is true and correct to the best of my knowledge and belief.

The mileage operated is broken down as follows: *7,596 road miles,* first main tracks; 573 miles, second main tracks; 78 miles other main tracks; 3070 miles siding and other tracks. These figures are substantially the same today.

The Rock Island, because of the wide geographical territory which it serves has numerous channels through which the traffic moves. We have approximately 513 railroad connections at 236 stations with 139 railroads.

All of the exhibits which I am offering, hereafter, in evidence during my testimony were prepared by me or under [fol. 4644] my direction and supervision and are true and correct to the best of my knowledge and belief.

The next exhibit I will ask to have marked Exhibit H-109 for identification.

Exam. Albus: It will be so marked.

(Intervener's Exhibit No. H-109, Witness Anderson, was marked for identification.)

The Witness: Exhibit No. H-109, consisting of one page, shows the ownership of Motive Power and Freight and Passenger Trains Equipment as of February 28, 1957 and is broken down as follows: 717 passenger cars of various types; 30,056 freight cars including 17,955 box cars; 5,700 gondolas; 1,419 covered hoppers; 1,350 non covered hoppers; 2,317 flat cars; 407 cabooses and in addition to this 1,247 miscellaneous work equipment cars.

During the period 1948 to 1956, inclusive, the following

	New Cars were added to our fleet:	*Cars given Heavy Repairs:*
1948	1000	6038
1949	994	6416
1950	1375	4485
1951	2523	4616
1952	1914	6162
1953	500	5471

	New Cars were added to our fleet:	*Cars given Heavy Repairs:*
1954	1091	3067
1955	482	4826
1956	1217	4277
[fol. 4645]		
1957	1350	5000
1958	777	(New cars on order)

I might add to the 1957 figures, as far as new cars added to our fleet they are correct. Cars given heavy repairs, of course, are projected to December 31 this year.

Exam. Albus: Very well.

The Witness: The 1958 figures are cars that we have on order.

Heavy repair programs are worked on a year-round basis to keep our fleet working at its maximum potential.

Attention is directed to the fact that the Rock Island is 100 percent dieselized. This program was completed in December, 1952 and we were the first major railroad to achieve this goal.

In recent years the Rock Island has made extensive additions, improvements and betterments in its equipment and facilities. We have provided extensive freight yard improvements. New retarder yards at Kansas City, Kansas, and Silvis, Illinois, are now in operation. These projects include construction of humps, electronically operated switches, and car retarders served by classification tracks where approximately 4000 cars can be classified in each yard daily. Both yards are equipped with flood lights, the latest type offices, yard radio, inter-communicating system teletypes and pneumatic tubes for handling waybills.

[fol. 4646] Further modernization of the Silvis retarder yard to make it completely automatic is now in progress and this same improvement will be made at Armourdale promptly.

At Kansas City we built a new power plant and the newest type of icing facilities for perishable traffic including the

newest type ice machines for bunker icing as well as retop icing within the body of the car. One hundred forty-two cars can be handled at one spotting.

We have constructed a diesel repair and servicing shop at 47th Street and Wentworth Avenue on Chicago's south side. The diesel house construction is of steel frame and brick which has six service tracks to accommodate a total of twelve diesel units at one time.

In addition, at 47th Street and Wentworth Avenue, we have wheel storage and heavy repair tracks. Here all diesel engines, operating into and out of the Chicago area, receive their service and repairs.

Emergency mobile radio sets are maintained at strategic points in areas where storm conditions interrupt regular communications so that such communications may be restored in the quickest possible time.

In addition to our network of long distance telephone dispatching circuits, we operate an extensive teletype system between our principal division headquarters and yards for [fol. 4647] the handling of car reports and to expedite the movement of traffic. We have direct teletype connections with off line offices, such as Atlanta, Georgia; Boston, Massachusetts; Buffalo, New York; Cincinnati, Ohio; Cleveland, Ohio; Detroit, Michigan; El Paso, Texas; Eugene, Oregon; Indianapolis, Indiana; Los Angeles, California; Medford, Oregon; Milkaukee, Wisconsin; New York, New York; Pittsburgh, Pennsylvania; Philadelphia, Pennsylvania; Portland, Oregon; Salt Lake City, Utah; Seattle, Washington; Sacramento, California; San Francisco, California; Spokane, Washington; Tulsa, Oklahoma; Toronto, Ontario, Canada; and Washington, D. C. We installed a modern redball system including additional teletype units, at approximately 40 cities all of which is designed to expedite the movement of traffic and to provide prompt and complete traffic information to the public.

May I have the next exhibit marked for identification?

Exam. Albus: Exhibit No. H-110 for identification.

(Intervener's Exhibit No. H-110, Witness Anderson, was marked for identification.)

The Witness: Exhibit No. H-110 consisting of one page, shows agency and non-agency stations on the Rock Island as of June 30, 1956. We have 648 agency stations; 621 non-agency stations for a total of 1269 stations in the States of Illinois, Iowa, Missouri, Minnesota, South Dakota, Nebraska, Kansas, Colorado, Oklahoma, Arkansas, Tennessee, [fol. 4648] Louisiana, New Mexico and Texas, all set up to make contacts with the shipping and receiving public.

May I have the next exhibit marked for identification?

Exam. Albus: Exhibit No. H-111 for identification.

(Intervener's Exhibit No. H-111, Witness Anderson, was marked for identification.)

The Witness: Exhibit No. H-111 consisting of three pages shows the published schedules of the Rock Island between Chicago, Illinois to principal points on line north, west, southwest and south.

We presently operate two expedited road freight trains, daily, into and out of our South Chicago Yard direct to Silvis Yard; the westbound trains operate as #183 leaving South Chicago about 5:30 PM and #191 leaving South Chicago about 5:00 AM. Eastbound, one train arrives in South Chicago about 9:00 AM daily, and the second about 7:00 PM daily. These trains were placed in service to move traffic from our direct connection at South Chicago to the west and likewise traffic from the west to our direct connections with the eastern railroads and to and from Chicago industries. These trains do not stop at our Burr Oak Yard but move directly through and on expedited schedules. Other fast freights, carrying from and to all Chicago points, are operated into and out of Burr Oak Yard located in Blue Island.

As business in the South Chicago area increases additional trains terminating and starting at South Chicago will be added.

[fol. 4649] The Rock Island has ample facilities and equipment to afford adequate service to and from the Lake Calumet area, and is capable of performing adequate service in the future to meet all rail transportation needs of the area.

At Lake Calumet there are two large grain elevators. Each has a total capacity of 6,500,000 bushels for a total of 13,000,000 bushels. Service by Rock Island of these elevators will not present a problem as Rock Island not only has ample facilities and equipment to afford adequate service, but has the experience needed to serve elevators of this size or greater. Rock Island serves many elevators exclusively at various places along its line including elevators which have capacities in bushels running into the millions. Enid, Oklahoma, has 10 elevators with a total capacity of about 65,000,000 bushels. Of the 10 elevators Rock Island serves 4 exclusively with a total capacity of 37,500,000 bushels. One has a capacity of 7,700,000 bushels, one 11,000,000 bushels, one 16,300,000 bushels, and one 2,500,000 bushels.

Our yard facilities at Enid consists of working and storage tracks aggregating 1830 car lengths. We have handled as high as 508 loaded cars of grain in a single day at these elevators served exclusively by the Rock Island. This does not include the grain interchanged to elevators served exclusively by other railroads within the Enid terminal.

Being one of the Granger Railroads, the Rock Island has [fol. 4650] grown with the grain industry and understands their needs and problems, as well as transportation requirements.

During 1956 Rock Island handled through Chicago Terminal 430,515 cars of which 295,998 were empty cars.

The statement has been made that entrance of other railroads into the Rock Island territory will increase car supply to shippers. The fact is that the entrance of other railroads will not increase car supply.

Another witness for the Rock Island will testify to the fact that at least at certain times of the year, cars will be

moving into the elevators loaded but will not get a return grain movement, and that unless outbound movements will be generated at other industries in the Lake Calumet area to take care of the empty cars, there will be a large surplus of empty cars.

This fact that during Lake season a large number of empty cars will be created because of the grain movement in with no outbound movement, has a distinct bearing on this question of car supply at the Port. These empty grain cars will be available for loading with commodities suited for such loading from Calumet Harbor Terminal, North Pier Terminal, and other Lake Calumet industries, and until the outbound movement in general cargo will require more empty cars than the elevators will create, there will be a surplus of empty cars.

In making this statement, I am not taking into account the fact that there will be large numbers of loaded cars [fol. 4651] into these other industries which will be available for outbound movement.

During the winter months when the lakes are closed, there is nearly always a general surplus and not a general shortage of cars.

If there should be a shortage of cars, it would be because of conditions applicable to all railroads. If, temporarily, the Rock Island should have a shortage at this point, it would rely on Circular T-71 of the Association of American Railroads.

May I have the next exhibit marked for identification?

Exam. Albus: It will be marked Exhibit H-112.

(Intervener's Exhibit No. H-112, Witness Anderson, was marked for identification.)

The Witness: Exhibit No. H-112 is a copy of Circular T-71 of the Association of American Railroads dated May 1, 1939, and still in effect, is entitled "Furnishing Equipment for Loading in Switching Service." This circular states that while shippers should place orders for equipment desired with the switching road on which cars are to be loaded,

it is the obligation of the roadhaul carrier to supply these cars unless the switching carrier already has within the switching district suitable cars of proper ownership to be applied on order for loading in accordance with car service rules. In short, it is the final obligation of the roadhaul carrier to furnish empty cars.

It is the obligation of the road performing the switching service to provide equipment when cars are to be taken to a [fol. 4652] destination within the same switching limits.

• • • • • • •

[fol. 4672] October 10, 1957

• • • • • • • •

J. H. GILFILLAN was sworn and testified as follows:

Direct examination.

By Mr. Bordes:

Q. Will you state your name and occupation, please?

A. J. H. Gilfillan, Division Superintendent, Southern Division, Rock Island Railroad.

• • • • • • •

[fol. 4673] On February 1, 1955, I was appointed Assistant Superintendent of the Chicago Division of the Rock Island and was appointed Superintendent of the same Division in May 1955. I was promoted to Superintendent of the Southern Division at El Reno, Oklahoma, July 16, 1957.

The various supervisory positions which I held required close association with all types of industries and acquaintance with their needs. Likewise, such positions required that I have a very thorough knowledge of all terminal yard switching operations.

While I was Assistant Superintendent and Superintendent of the Chicago Division, I became familiar with railroad operations in the Pullman-Lake Calumet area.

Exam. Albus: That will be marked as Exhibit H115 for identification.

[fol. 4674] (Exhibit H115, Witness Gilfillan, marked for identification.)

The Witness: I offer Exhibit H115. This exhibit was prepared under my direction and supervision and is true and correct to the best of my knowledge and belief.

By Mr. Bordes:

Q. Mr. Gilfillan, is this Exhibit H115 which is on the easel?

A. Yes.

Mr. Bordes: Exhibit H115 is shown here, gentlemen, on the easel.

The Witness: We had copies but apparently they weren't attached. They are in the other room.

Exam. Albus: Proceed.

The Witness: This is a map on which, in red coloring, is shown the Rock Island Lines as it exists in the Chicago Switching District. In the lower left hand portion is shown our main tracks extending beyond the switching district limits in the direction of Joliet, Illinois, which is near the end of the Chicago Division.

Starting at LaSalle Street Station, our railroad extends in a southerly direction to 63rd Street, Englewood, a distance of 6.7 miles; then southwesterly to Gresham, 89th Street, 3.1 miles, at which point our main track crosses our South Chicago Line. Gresham is also a junction point for our double track Suburban Line which runs westerly [fol. 4675] from Gresham to Beverly Junction, 1.1 miles, at which point the line continues in a southerly direction to Western Avenue Junction, Blue Island, Illinois, 5.6 miles, where it again joins our main track.

The main track extends from Gresham in a southwesterly direction to Western Avenue Junction, Blue Island, Illinois, 6.0 miles, and then continues in a southwesterly direction to a point beyond Joliet, 29.1 miles. Our South Chicago Line extends from Gresham easterly to Rock

Island Junction, 5.5 miles. At a point 3.2 miles east of Gresham, our line, known as our Pullman District, branches off and extends 5.6 miles. It runs in a southerly direction from 95th Street to approximately 130th Street, then easterly parallel with and north of 130th Street to Doty Avenue, crosses Doty Avenue at grade and continues in an easterly direction terminating at the entrance of the Calumet Harbor Terminals, Inc., and connecting with the industry tracks of that company.

Fourteen hundred fifty (1,450) feet east of Doty Avenue this line connects with the Chicago Regional Port District yard lead, leading to their switch yard, consisting of 10 tracks with capacity of 250 cars.

Near the eastern terminus of our South Chicago Line is located our South Chicago Yard which is parallel with and lays north of 95th Street, extending roughly from Cottage Grove Avenue to Commercial Avenue, a distance [fol. 4676] of 2.7 miles, consisting of 11 tracks with 1017 car capacity. At the east end of the South Chicago Yard, a line branches in a southerly direction into the Irondale District, 1.1 miles, and connects at 106th Street with the Calumet Western Railroad jointly owned by the Rock Island, Indiana Harbor Belt and Pennsylvania Railroads and which railroads terminate at 130th Street, a distance of 3.0 miles.

This map is provided so that my explanation later on in the testimony of the movement of cars to and from the Lake Calumet Port area may be readily followed. On this map, we have designated the location of existing facilities of the Lake Calumet Port and the various interchange points and railroad yards which will be mentioned in this testimony.

The Legend on this map is arranged so that ready identification can be made of the direct interchange locations the Rock Island Railroad has established with other railroads serving the Chicago area.

Exam. Albus: The next exhibit number is H116.

(Exhibit H116, Witness Gilfillan, marked for identification.)

The Witness: I offer Exhibit H116. This exhibit was prepared under my direction and supervision and is true and correct to the best of my knowledge and belief.

This exhibit shows the railroads to which we effect direct deliveries and gives the rail mileages between Lake [fol. 4677] Calumet Port and their yards.

The Rock Island Lines effect direct interchange with the Pennsylvania Railroad at South Chicago in their Colehour Yard (designated Number 9 on the map)—

Mr. Chartrand: Mr. Gilfillan, at that point may I ask you this question? You show a direct interchange at the Colehour Yard, yet on your map there is no red line indicating that you operate into the Colehour Yard.

The Witness: This does not have reference to any red lines. It tells the points at which we go in and effect interchange deliveries.

Mr. Chartrand: My question is you indicate you have a right of interchange with the Pennsylvania at the Colehour Yard. Does that mean that you operate into the Colehour Yard?

The Witness: That means that we take cars from our South Chicago Yard and that will apply to all of these places mentioned on this exhibit.

We take cars in direct delivery from our various yards into the yards of the carriers mentioned.

Mr. Chartrand: Yes. Well, then, that means that you are operating over the Pennsylvania's tracks into their yards?

The Witness: That is the only way we could get in there.

Mr. Chartrand: Not over your own tracks?

The Witness: Was that a question?

Mr. Chartrand: Yes.

[fol. 4678] In other words, you mean that your direct connection with the Pennsylvania at the Colehour Yard is by operating from South Chicago to the Colehour Yards over the Pennsylvania tracks, is that correct?

The Witness: Over our tracks and the Pennsylvania tracks, yes.

Mr. Chartrand: Over your tracks and the Pennsylvania tracks?

The Witness: That is right.

Exam. Albus: All right. Continue with the direct, please.

By Mr. Bordes:

Q. Isn't it a fact, Mr. Gilfillan, that every railroad operates over the tracks of other railroads in making interchange?

A. All railroads in the Chicago Terminal that deliver to other railroads must necessarily use the rails of other carriers. It may be a combination of one, two, three, or four.

Q. Will you proceed?

A. The Rock Island Lines effect direct interchange with the Pennsylvania Railroad at South Chicago in their Colehour Yard (designated Number 9 on the map); to the E. J. & E. Railroad (Number 7) at South Chicago; to the B. R. C. (Number 17) in Rock Island 97th Street Yard; to B. R. C. (Number 16)—

Mr. O'Brien: Excuse me, Mr. Gilfillan.

It might be well, Mr. Examiner, if Mr. Gilfillan points out on the map various interchanges because they are numbered and it might be hard to find them.

[fol. 4679] Exam. Albus: All right.

Mr. O'Brien: Are you still on Exhibit H116?

The Witness: Yes.

Mr. O'Brien: Could I get some clarification as to the mileage between the Lake Calumet Port and the railroads with which the Rock Island effects direct delivery movements?

It says the mileage from 124th Street Yard to the various yards—would you clarify that for us? As I understood it is the mileage from these yards to the Port, and yet it says from the 124th Street Yard to the various railroad yards.

The Witness: Where are you quoting from?

Mr. O'Brien: From your exhibit.

The Witness: Oh, from the exhibit.

The mileage was figured by the engineers from this point here (indicating).

Mr. O'Brien: When you say "this point," would you indicate what you are pointing to?

The Witness: This point I will identify is in the lower part of Lake Calumet and approximately at the southern end of Lake Calumet Port Yards.

Mr. O'Brien: It is within the Port District itself?

The Witness: That is within the Port District itself about at the point where we connect with the Port, south of the Port Yards.

[fol. 4680] Mr. O'Brien: It is not necessarily the only entrance to the Port?

I mean, in other words, there could be closer entrances to these various yards than 124th Street?

The Witness: It is the only entrance to the Port, the only entrance existing in the Port today for railroads, yes.

Mr. O'Brien: The only Rock Island entrance?

The Witness: It is the only entrance.

Mr. O'Brien: There is no entrance any place else other than that?

The Witness: There is no other railroads connecting into the Port area at this time.

Mr. O'Brien: Let me ask are the tracks of the Port District running south of 124th Street?

The Witness: Well, in the vicinity of 124th they turn around to the east, yes.

Mr. O'Brien: And they go south?

The Witness: There are tracks south of 124th.

Mr. O'Brien: So it is possible that those tracks could be closer, the Port District tracks could be closer to certain railroad yards than the mileage you speak of at 124th Street?

The Witness: No, I doubt it, not rail mileage. I am talking railroad mileage.

Mr. O'Brien: That is what I am talking about is rail mileage, too.

[fol. 4681] I am not going into cross examination, I just wanted to clarify it before we go any further.

In other words, there are tracks that are south of 124th Street at the present time, are there not, within the Chicago Regional Port District?

The Witness: That is correct.

Mr. O'Brien: Now if tracks could be connected from some other railroad, they would be closer to that yard than 124th Street, would they not?

The Witness: Are you talking about rail miles or as the crow flies?

Mr. O'Brien: Rail miles.

The Witness: No, they wouldn't be closer.

Mr. O'Brien: We will develop that later. Go ahead. I just wanted to clear that up.

Exam. Albus: Thank you.

Proceed with the direct, please.

The Witness: —to B. R. C. (Number 16) South Chicago Yard; and B. R. C. (Number 15) Clearing Yard; to the B. & O. C. T. (Number 1) at Barr Yard, Blue Island, Illinois; to the C. & O. Railroad (Number 10) on a track in the B. R. C. Yard at South Chicago; to the Chicago West Pullman & Southern (Number 6) at 104th Street, South Chicago; to the Nickel Plate (Number 8) at their Calumet Yard in South Chicago; to the New York Central (Number 12) at 63rd Street, Englewood Yard; to the [fol. 4682] C. S. S. & S. B. (Number 4) at 124th Street, Kensington, and this delivery to the South Shore also contains traffic for the B. & O. which, in turn, is given to the B. & O. by the C. S. S. & S. B. at East Chicago; to the C. & E. I. (Number 13) at Oakdale, at 91st Street and Eggleston Avenue, South Chicago; and to the C. R. & I. C. J. (Number 14) at 39th and Racine; to the Wabash (Number 19) at Wabash Landers Yard;—

Mr. Bordes: Is that 79th Street?

The Witness: Yes, 79th Street, south 79th Street.

—to the Erie Railroad (Number 18) at Hammond. We are also negotiating one with the Monon Railroad (Number 20) also at Hammond. At Kensington, 115th Street, we interchange direct with the I. C., M. C., I. H. B. and N. Y. C.

Cars for the M. C., N. Y. C. and I. H. B. are placed on track 4 in our 115th Street Yard at Kensington and are pulled from that yard by the N. Y. C. Cars for the Illinois Central are placed on track 3 and pulled by the I. C. from that same yard.

The N. Y. C., I. H. P., M. C. and I. C. deliver cars to the Rock Island in our 115th Street Yard at Kensington.

At Blue Island, Illinois, direct interchange is made with the G. T. W. (Number 3); the I. H. B. (Number 2), and the B. & O. (Number 1). These three railroads also deliver directly into the Burr Oak Yard of the Rock Island at Blue Island. We receive on direct delivery at our South [fol. 4683] Chicago Yard cars from the following railroads: E. J. & E., C. W. P. & S., C. & O., P. R. R., Nickel Plate, N. Y. C. and C. S. L.

Such traffic as is routed for movement over roads which do not have a direct connection with the Rock Island Lines is moved by the B. R. C., I. H. B., C. R. & I., or the B. & O. C. T. Cars originating in the Lake Calumet Port area for indirect delivery via the B. R. C. of Chicago, that is, are delivered to the B. R. C. at their South Chicago Yard, or placed on a track in our 97th Street Yard in the Pullman District, which cars are pulled by a B. R. C. engine.

I should explain there that the normal movement of cars in the Pullman Railroad and the Lake Calumet Port area, they are for roads for which the Belt is the intermediate carrier, those cars are placed on a track at the 87th Street Yard and are pulled by the Belt—that is the 97th Street Yard, and they are pulled by the Belt. We have on occasion taken them into South Chicago and given them to the Belt there.

Cars from the Pullman District, routed via the I. H. B. for connecting lines, or for industries located on the I. H.

B., are given to the I. H. B. at our 115th Street Yard, Kensington. Cars for the B. & O. C. T. are delivered to the B. & O. at their Barr Yard. Cars for the C. R. & I. are taken to the C. R. & I. Seeley Avenue Yard.

Exam. Albus: The next exhibit is H117.

[fol. 4684] (Exhibit H117, Witness Gilfillan, marked for identification.)

The Witness: I offer Exhibit H117. This exhibit was prepared under my direction and supervision and is true and correct to the best of my knowledge and belief.

This exhibit shows the intermediate carriers and the distance from the Lake Calumet Port, and this is rail mileage which is shown on that exhibit.

At this point I desire to refer to Exhibit No. H92, introduced by Mr. L. B. Pritchett, which is a map showing that portion of the Rock Island Railroad extending from Pullman Junction, 95th Street, on the north, in a southeastwardly direction, terminating at the Calumet Harbor Terminals, Inc., located on the south edge of Lake Calumet, 5.6 miles from 95th Street.

The solid red lines indicate trackage owned or leased by the Rock Island Lines; red and yellow indicate trackage built by Rock Island since January 1, 1950; solid orange indicates Calumet Harbor Terminals, Inc., trackage which has been served by Rock Island since January 1, 1950, and prior thereto by the Pullman Railroad; yellow indicates new trackage proposed by Rock Island.

The South Chicago Yard consists of 11 tracks with 1,017 car capacity. Ultimately the yard will have 18 tracks with capacity for 1,886 cars.

[fol. 4685] The 97th Street Yard consists of 9 tracks with 190 car capacity. Ultimately the yard will have 14 tracks with capacity for 445 cars.

The 115th Street Yard consists of 7 tracks with 190 car capacity.

At first, the 124th Street Yard will have 9 tracks with capacity for 242 cars. Ultimately the yard will have 16

tracks with capacity for 412 cars. In addition, we have land available for construction of additional tracks with a capacity of 1200 cars, making an ultimate total capacity at 124th Street of 1,612 cars.

Mr. Chartrand: Mr. Gilfillan, at that point would you refer to Exhibit 92 which shows the potential of the 124th Street Yard of 530 cars, and you here revise it to read 412. Now which of those two are correct?

Exam. Albus: I think you had better reserve that for cross examination, Mr. Chartrand. Let's get through with this direct, first.

The Witness: In addition to these yards, all of which are in close proximity to Lake Calumet, we have Gresham Yard, 89th and Vincennes Avenue at the western end of our South Chicago Line, present capacity 84 cars which can be expanded to 150 car capacity; Burr Oak Yard at 127th Street and Western Avenue, present capacity of 3500 cars which can be expanded to 3800 car capacity; and we have land at 115th Street east of and adjacent to our main [fol. 4686] tracks on which we can construct a yard to hold 1600 cars. Presently we have yard capacity for 4981 cars, and can expand to a capacity of 9733 cars.

With traffic increasing since 1950 and with the expansion of industry and yard facilities, it was necessary to increase the number of switch engine assignments working in the Pullman area.

Exam. Albus: The next exhibit is H118 for identification.

(Exhibit H118, Witness Gilfillan, marked for identification.)

Mr. O'Brien: Can I get a clarification of that? You mean since 1950 you made this change, or since 1950—

The Witness: I didn't get that question. Since what?

Mr. O'Brien: Well, you said with traffic increasing since 1950 either it was necessary to increase the number of switch engines—did you mean that you increased them in 1950 or has it been some time since then that you increased the number of switch engines?

I just wanted to clarify that.

The Witness: The exhibit shows what the study contemplates.

I offer Exhibit H118. This exhibit was prepared under my direction and supervision and is true and correct to the best of my knowledge and belief. This exhibit shows the number of switch engine assignments worked in the Pullman District annually from 1950 to 1956, inclusive.

[fol. 4687] It should be understood that this includes both regular assigned switch engine tricks and extra switch engine tricks worked. It shows the total number of engine hours worked as well as the total number of cars handled in and out of that territory.

Now when I say "total number of cars," that exhibit shows only the loads into and out of the territory. It does not cover any of the empties.

While this exhibit shows the engine hours worked by engines assigned to that territory, it does not show the additional switch engine hours worked by engines coming from our South Chicago Yard and from our Burr Oak Yard, which performed switching service in the entire territory from 95th Street south and particularly in the area around the Lake Calumet Port and Calumet Harbor Terminals, Inc.

These additional engine hours, worked by engines from these other two yards, are regularly required in order to keep this territory fluid and to move cars currently in and out of this territory. This is particularly true during the season of the year when vessels are regularly moving in and out of Lake Calumet, as it is then necessary that carload shipments for the individual boats be moved into the Port area so that the commodities in these cars may be loaded in proper sequence.

We are prepared to furnish such additional service as may be required in this territory.

[fol. 4688] Not only do we have a flexible switching operation in the vicinity of the Lake Calumet Port area, but our entire terminal operation is also geared to provide a constant flow of cars into and out of this area without inter-

fering with the work being performed by the engines pulling and setting cars at dock side or at the various transit sheds, warehouses and elevators.

Presently cars in possession of the P. R. R. destined to the Lake Calumet Port area are given to Rock Island by the P. R. R. at R. I. South Chicago Yard, 3.5 miles from Colehour Yard. On receipt of these cars by the Rock Island, they can be moved directly to the Lake Calumet Port area by a Rock Island engine.

In reverse movement, cars originating in the Lake Calumet Port area routed via the P. R. R. are moved in direct interchange from the Port by Rock Island engines to the P. R. R. Colehour Yard.

Cars in possession of the I. C. R. R. at Markham Yard destined to the Lake Calumet Port Area, are moved in direct interchange by the I. C. to Rock Island 115th Street Yard at Kensington. On receipt of these cars in Rock Island 115th Street Yard, they can be moved directly to Lake Calumet Port Area.

In reverse movement, cars originating in the Lake Calumet area are taken by Rock Island engines to the Rock [fol. 4689] Island 115th Street Yard and immediately interchanged to the I. C. and we are pulled from that yard by an engine of the I. C.

The N. Y. C. has a direct interchange connection with Rock Island at the Rock Island 115th Street Yard in Kensington. The N. Y. C. not only delivers directly to this yard but also pulls cars from this identical yard.

Mr. O'Brien: May I get a clarification on that? Is that 115th Street Yard the same as the old Pullman Yard?

The Witness: No, it is the same as one of the old Pullman yards. It is the south yard of Pullman at 115th and Kensington.

Mr. O'Brien: Is it known sometimes as the old Pullman Yard?

The Witness: I don't know if it is ever known as the old Pullman Yard. It is located at 115th Street south of Kensington Avenue or south of 115th at Kensington.

Mr. O'Brien: Thank you.

The Witness: I might add here that the service the New York Central performs is identical for the Indiana Harbor Belt. The cars of the Indiana Harbor Belt are interchanged at the same yard, 115th Street, and pulled by the New York Central.

The C. S. S. & S. B. delivers cars directly to the Rock Island in the vicinity of 124th Street on established interchange tracks, and this road, the South Shore, also pulls cars from these same interchange tracks, which are placed there by the Rock Island.

[fol. 4690] The B. R. C. makes direct interchange delivery to Rock Island at the Rock Island 97th Street Yard. In addition to having a direct delivery to Rock Island at 97th Street Yard, the B. R. C. has the additional advantage of pulling cars with their own crews from the Rock Island 97th Street Yard. Rock Island pulls cars out of B. R. C. South Chicago Yard and brings them to Rock Island South Chicago Yards adjacent to the B. R. C. Yard at South Chicago.

Considering that each of the applicant roads has direct interchange with Rock Island at points close to the Lake Calumet Port area, they now move traffic to and from the Lake Calumet Port area via shorter routes than those proposed in their applications in this hearing.

Exam. Albus: The next exhibit is H119, for identification.

(Exhibit H119, Witness Gilfillan, marked for identification.)

The Witness: I offer Exhibit H-119, which has been prepared under my direction and supervision and is true and correct to the best of my knowledge and belief.

This exhibit is a study showing the density of traffic on the K. & E. R. R. between 115th Street, Kensington, and the Calumet River for a 24-hour period, 2:00 p.m., April 1st, to 2:00 p.m., April 2nd, 1957.

The applicant roads propose to use these tracks as a portion of their proposed route to gain entrance to the [fol. 4691] Lake Calumet Port Area.

This exhibit shows the moves presently being made by freight and passenger trains over the two main tracks of the K. & E. between 115th Street and Calumet River. All movements by applicant roads to and from Lake Calumet Port area will not only increase the density of the traffic, but will also result in delays.

The applicants P. R. R., B. R. C., I. C. and I. H. B. and N. Y. C. and C. S. S. & S. B. propose to handle their cars over these tracks to and from the Port, each making two deliveries a day or a minimum of 24 additional train movements will be added on these tracks. Of these 24 movements, at least four will be made in back-up movements.

Mr. Ferner of the South Shore stated that these tracks will be restricted for movements to and from the Port between the hours of 7:00 a. m. to 8:20 a. m. and again between 5:00 p. m. to 6:30 p. m.

This exhibit shows that on April 1st and 2nd, there were four movements on the eastbound track between 5:00 p.m. and 6:00 p.m. and five movements on this same track between 7:00 p.m. and 8:00 p.m., that there were four movements on the westbound track between 7:00 a.m. and 8:00 a.m., on April 2nd and four movements on the westbound track between 8:00 a.m. and 9:00 a.m. and four movements on the eastbound track between 10:00 a.m. and 11:00 a.m. [fol. 4692] This is the route over which the applicants propose to superimpose a minimum of 24 additional train movements during the parts of the day when the South Shore states they will permit them to use these tracks without restrictions. The time of movement of these minimum of 24 train movements over these tracks and over the single track leading there from down under the 130th Street bridge into the Port Yard will not be governed by the requirements of the Port traffic but by the capacity of the South Shore tracks and the single track leading from the South Shore into the Port.

Exam. Albus: The next exhibit is H120 for identification.

(Exhibit H120, Witness Gilfillan, marked for identification.)

The Witness: I offer Exhibit H120. This exhibit was prepared under my direction and supervision and is true and correct to the best of my knowledge and belief.

This exhibit shows the movements from June 6 to July 5, 1957 and shows the volume of traffic moving over a section of track which connects the Belt Railway of Chicago with the Illinois Central.

This track extends from Pullman Junction near 95th Street and Stony Island Avenue to the I. C. tracks near 91st Street and Cottage Grove Avenue. P. R. R. proposes to use this trackage as an alternate route to reach the K. & E. connection with the I. C. at 116th Street interlocker. [fol. 4693] B. R. C. also proposes to use this track to connect with the I. C.

In the proceeding before the Interstate Commerce Commission in which the Rock Island asked for approval of its purchase of the stock and control of the Pullman Railroad, Mr. W. E. Curley, who at that time was Superintendent of Freight Service for the Illinois Central, testified.

I offer in evidence a copy—

Exam. Albus: This would be Exhibit H121 for identification.

(Exhibit H121, Witness Gilfillan, marked for identification.)

The Witness: I offer in evidence Exhibit H121 which is a copy of that portion of the record of the Rock Island purchase case which contains Mr. Curley's direct testimony and cross-examination.

The purpose of his testimony was, first, to describe how the Illinois Central interchanges to traffic to the Pullman Railroad Company. In short, he testified that interchange between Pullman Railroad Company and the Illinois Central was accomplished at 116th Street on the Pullman tracks.

According to that portion of the record which contains Mr. Curley's testimony, Mr. Heide, who at that time was Superintendent of the Rock Island for the Chicago Terminal Division, had stated that if the Rock Island purchased the Pullman Railroad, it would prefer to continue the in- [fol. 4694] terchange as it is at the present time but that if it were not retained, the alternative method would be to handle it through the Belt's South Chicago Yard.

At that time, as now, the Illinois Central was interchanging traffic with the Pullman Railroad—general traffic moving both to and from industries on the Pullman Railroad, and was also interchanging garbage cars which handled refuse for dumping at the north end of Lake Calumet.

The witness Mr. Curley was asked this question:

"I wish you would explain, if you will, how you would handle that traffic—both general freight and refuse—if you had to interchange through the Belt's yard at South Chicago. I wish you would in the course of your explanation state what, from an operating standpoint, would be the merits or demerits of these two plans. This question was asked at page 151 of the record.

"By Mr. Zoll:

"Q. Would there be any delay in our getting into the Belt yard at South Chicago in connection with either of these moves?

"By Mr. Curley:

"A. Our connection to the Belt yard at South Chicago after we leave our main track is a single track operation, from there to the Nickel Plate crossing.

"In addition, if this move is contemplated in addition to [fol. 4695] that move, we have anywhere from 12 to 20 movements a day over that single track piece of railroad. When you arrive around at the east end of that you will run first into the north bound main track of the Belt Railway, and then you go down 12 or 15 car lengths. You will have to stop at the main tracks of the Nickel Plate.

"There would be considerable delay because I know from actual experience, I spent a lot of time around there, particularly, and there is a tremendous amount of traffic and congestion in that particular point. It is a point we try to keep away from as much as we possibly can."

The single track over which the Illinois Central at that time had 12 to 20 movements a day, if they were running into the northbound main track of the Belt and stopping at the main tracks of the Nickel Plate, where there is a tremendous amount of traffic and congestion according to Mr. Curley, and the point which Mr. Curley stated the Illinois Central tried to keep away from as much as it possibly can, is the track which the Pennsylvania and the Belt would use in getting onto and off the tracks of the Illinois Central at 94th Street.

Exam. Albus: The next exhibit is H122 for identification.

(Exhibit H122, Witness Gilfillan, marked for identification.)

[fol. 4696] The Witness: I offer Exhibit H122. This exhibit was prepared under my direction and supervision and is true and correct to the best of my knowledge and belief.

This exhibit shows in contrasting colors the various routes the individual applicants stated in their applications they would use. In the application the Pennsylvania stated that it would reach the Port from Colehour Yard. Their testimony shows that since filing the application, the Pennsylvania has decided to base traffic moving from the south on Dolton Yard but we have not changed this exhibit.

Therefore, the line of the Pennsylvania shown in red running from Colehour Junction near 103rd and Indianapolis Boulevard to Bernice at the south end of the map may be disregarded for the purposes of this hearing.

You will note on this exhibit, the P. R. R. Colehour Yard is located near 100th Street on the lake front. This is one of the large freight yards of the P. R. R. in the Chicago Terminal District. From this yard, the P. R. R. has a track

extending in a southerly direction crossing the tracks of the C. S. S. & S. B., the C. & W. I., and the Nickel Plate near 138th Street, continuing in a southerly direction crossing the N. Y. C. near 145th Street and then continuing in a southerly direction to approximately 167th Street, Bernice, at which point this line connects with the so-called "Pan Handle Line" of the P. R. R.

[fol. 4697] This "Pan Handle Line" of the P. R. R. originates near 59th Street Yard of the P. R. R. and runs in a southeasterly direction from this 59th Street Yard to the connection at Bernice, 167th Street.

The Pennsylvania proposes to use the Dolton Yard as the yard from which it will serve the Port from the south and its traffic would move from that point in a northwesterly direction over the Pan Handle line from Dolton to Riverdale, Illinois, 138th Street, at which point it proposes to connect with the Illinois Central.

This I. C. track is not a main track of the I. C., but a yard lead or running track extending from about 138th Street in a northerly direction through the Wildwood Yard of the I. C. and connecting with the main track of the I. C. near 124th Street.

Continuing from 124th Street, the P. R. R. proposes to use one or more of three main tracks between 124th Street and 116th Street interlocker. After pulling by 116th Street interlocker, they propose to back onto the K. & E. near 116th Street and continue in backup movement over the K. & E. to a point near 130th Street and east of Doty Avenue, at which point the applicant railroads propose to construct trackage which will permit movement of trains off the K. & E. elevation to a new entrance into the Lake Calumet area near 130th Street and the Calumet River by going under 130th [fol. 4698] Street and then back westward into the Port area district.

This route requires crossing railroads at grade, moving through numerous street crossings at grade, through interlocker plants of other railroads and use of tracks being used by other railroads, all of which makes for a poor route and

a route over which the applicant railroads cannot control delays resulting from conflicting movements.

Mr. Bierma: Could I ask a question for clarification?

Could you break up that last conclusion that you have there as to whether the crossing of the railroads at grade are on the Pennsylvania part of that route, or on the Illinois Central tracks which make up the entire route to the Port?

In other words, could you specify whether you are talking about crossing railroads at grade on Pennsylvania Railroad property or on the Illinois Central, and the same thing about moving through numerous streets, crossing at grade, and so forth.

Could you break it up that way?

The Witness: You got a pretty long question there. I don't quite follow you.

Mr. Bierma: All right. In other words, are you stating that they cross railroads at grade on both the Pennsylvania Railroad portion of the route and the Illinois Central portion of the route?

[fol. 4699] The Witness: Are you talking about the Pennsylvania now?

Mr. Bierma: The Pennsylvania route, as you know, is made up part of Pennsylvania Railroad tracks and then we move over Illinois Central tracks.

What I want to know is, are the crossings of the railroads at grade on the Pennsylvania Railroad part of that route or on the Illinois Central part of that route, and I want to know the same thing for the crossing at grade and the interlocker plants.

Mr. Bordes: Or both.

Mr. Bierma: Or both, yes.

The Witness: You are talking about the Pennsylvania Railroad, the railroad crossing is at grade to the interlocker at Dolton?

Mr. Bierma: What do we cross at Dolton, please?

The Witness: Well, you cross at Dolton the two main tracks of the Indiana Harbor running east and west be-

tween the Blue Island Yards and Gibson which is a pretty heavily traveled route that handles all of the traffic between the two main yards of the Indiana Harbor across there.

Mr. Bordes: Are you interested, Mr. Bierma, only in the highway crossings at grade or the railroad?

Mr. Bierma: Both.

The Witness: I was going to take the interlockers first.

Then going north there you cross the B. & O. tracks [fol. 4700] at Dolton and I can probably give each one of them off the map.

Mr. Bordes: Will you look at the map, Mr. Gilfillan?

The Witness: Yes, I will get the map.

Mr. Bordes: That is Exhibit H122.

The Witness: I am just taking this for the purpose of checking the railroad crossings at that point.

I mentioned that you cross the track, the two main tracks of the Indiana Harbor Belt which leads east and west through Blue Island Yards to the Gibson Yard of the Indiana Harbor Belt; then onto and across the B. & O. tracks near Riverdale, and just a few hundred feet south of the track leading to the Illinois Central where the Pennsylvania connects with the Illinois Central.

As you proceed north from that connection which runs parallel with the Illinois Central elevation, but not on the elevation, it is on the ground level, and not on the elevation, you proceed north on the Illinois Central.

Mr. Bierma: Are we off of the Pennsylvania Railroad now?

The Witness: Yes, you are off the Pennsylvania Railroad now, you are on the Illinois Central.

Mr. Bierma: All right, now we are on the Illinois Central. Okay.

The Witness: And as you proceed north on this yard track which is not on the elevation of the Illinois Central but on the ground east and parallel with the Illinois Cen- [fol. 4701] tral elevation, you proceed northward and cross 130th Street at grade.

Mr. Bierma: Is that a grade crossing, then?

The Witness: Yes, that is a grade crossing, 130th Street.

Mr. Bierma: 130th Street at the Illinois Central you have a highway grade crossing?

The Witness: That is a highway grade crossing and that track is perhaps 50 feet east of the Illinois Central elevation. The Illinois Central main tracks cross 130th Street elevated there, and 130th Street goes underneath the Illinois Central main tracks, but this track which the Pennsylvania uses does not cross on elevation, it crosses at grade.

It goes across 130th Street and then proceeds north to about 124th Street going to Wildwood Yard.

Mr. Bierma: I think you have covered that in your direct just ahead of that.

The Witness: I was just doing this to keep myself on these different places that you wanted located.

Mr. Bierma: Go ahead.

The Witness: And then as you go north through the Wildwood Yard you go up one of the Illinois Central elevations about 124th Street where you go through the Illinois Central interlocker plant.

Mr. Bierma: Is there a highway crossing at 124th Street?

The Witness: No. As you pull through—then you pull through the interlocker plant of the Illinois Central and of [fol. 4702] course naturally have to shove back to it.

Mr. Bierma: Am I correct, then, the only highway crossing is at 130th Street on the Illinois Central track portion of the route?

The Witness: You mean the only one for your entire movement?

Mr. Bierma: Yes.

The Witness: Oh, no.

Mr. Bierma: Are there any other highway crossings?

The Witness: Yes, there are numerous other highway crossings on the route from the Pennsylvania north. I can't enumerate each one of them. I believe 145th Street is one, 159th Street is one of them, Route 6, you cross Route 6 at

grade; 145th Street on the Pan Handle, that is another one.

I am sure there are others but I am not familiar with them. I am familiar with that one.

Mr. Bordes: Continue with your direct examination, please.

The Witness: Referring to Exhibit H122 and starting at Colehour Yard, P. R. R. proposes as an alternate route, moving northward from Colehour Yard over the tracks of the B. R. C. at South Chicago paralleling Rock Island South Chicago Yard, 95th Street to Pullman Junction, thence westerly to a connection with the I. C. near 91st Street and Cottage Grove Avenue, thence northward through the connection until the entire train is on the I. C. track, thence a backup movement over I. C. tracks would [fol. 4703] be made in a southerly direction to a connection with the K. & E. at 116th Street interlocker.

Backup movement would then continue over the K. & E. to a proposed connection into Lake Calumet Area east of Doty Avenue and under the 130th Street bridge. This alternate route of 10.4 miles necessitates use of tracks presently handling a considerable volume of business, crossing of railroads at grade, and movement through interlocker plants of other railroads.

This move by the Pennsylvania is over the single track Belt connection with the Illinois Central, about which I quoted some time ago Mr. Curley's testimony as to its congestion, and also an exhibit to show that.

The B. R. C. will connect with the I. C. at 95th Street near Cottage Grove Avenue and will proceed north until the entire train clears the switch on the I. C. main track then in back-up movement over the I. C. to 116th Street interlocker at which point the B. R. C. will enter upon the K. & E. enroute to Lake Calumet Port area, and they, too, will use the single track entrance off the K. & E. down off the 130th Street bridge and then back westward into the Port area.

N. Y. C. proposes to enter Lake Calumet Port area by one of two routes. One proposal requires construction of

a track starting easterly in the vicinity of 126th Street near Cottage Grove Avenue and at the south end of their Ken-
[fol. 4704] sington Yard, cross the two main tracks of the K. & E. at grade and the tracks of the Rock Island at grade, thence easterly and at an ascending elevation which will permit them to cross Doty Avenue over a bridge which they propose to build, thence by descending elevation to connect with the tracks of the Port near the south end of the Port yard. The other proposal is to construct a connection from their tracks near 126th Street and Cottage Grove to the main tracks of the K. & E., using the tracks of the K. & E. to a point east of Doty Avenue and then enter the Port over the proposed track to be constructed by I. C. and P. R. R., down the single track and over the bridge and back into the Port area.

The C. S. S. & S. B., which presently uses the K. & E., will continue to use this same route to the proposed connection near 130th Street and east of Doty Avenue and under the 130th Street Bridge, then back into the Lake Calumet Port area.

Mr. O'Brien: When you say "back—" when you refer to the New York Central and the South Shore, do you mean a backing movement?

You say back into the Port area?

The Witness: I refer to their movement down the single track, under the 130th Street bridge, and I should have said "then westward into the Chicago Port area."

What I had reference to, once we had gone west, we had to go back west and come back east into the port.

[fol. 4705] Exam. Albus: All right. Proceed.

The Witness: Rock Island's entrance into the Lake Calumet Port area is not hampered by type of movements shown on these exhibits. Rock Island's entrance is made directly over its own tracks and with minimum interference.

I have shown the various obstacles which would exist creating delays to each of the applicant roads attempting to use these various routes in the movement of their cars

from their various train yards to the Lake Calumet Port area. Expeditious movement of cars between the inbound carrier and placement in an important Lake Port area is essential for handling cars in and out of such area. None of the routes proposed by the applicant railroads lends itself to such expeditious service.

In furnishing switching service to the Lake Calumet Port area, there is a need for unhampered switching to be immediately and consistently available in the area itself for the setting and spotting of cars at dock side, transit sheds, warehouses, and elevators.

Exam. Albus: The next exhibit number will be H123.

(Exhibit H123, Witness Gilfillan, marked for identification.)

The Witness: I offer Exhibit H123. This exhibit shows the trackage lay-out existing in the Lake Calumet Port area property.

[fol. 4706] It will be noted that a classification or holding yard has been constructed consisting of 10 tracks with 250 car capacity. Tracks lead from this yard into the two elevators, the present dock, transit sheds and warehouses.

Each of these industry tracks is stubbed at the far end, and I am speaking of those tracks which serve the warehouses, elevators, docks and transit sheds, and a switch engine serving this territory must necessarily do so from the west end of these various facilities.

Experience has shown us that an elevator of six and one-half million bushel capacity using a car dumper to unload their grain will unload approximately 12 cars per hour or 120 cars per 10-hour day. If the elevators would work around the clock, their maximum unloading capacity would be 576 cars per day.

Because of the limited trackage available at each elevator, a switch engine must be available throughout the unloading period to keep each elevator supplied with loads and to pull the empties from the unloading track. Likewise,

during the season when the lakes are open to ship traffic, an engine must be available constantly switching loads to and from the dock side.

I have always understood that the Port District did not want the tracks on Port District property in the Port District yard to be used for anything, except switching opera- [fol. 4707] tions within the Port area, that these tracks were not to be used for blocking of cars or storage of cars or the assembling of cars for outbound movement according to the classification of railroads which would receive the cars.

What I had already understood was stated by Mr. Max Cohen, General Manager of the Port District in his testimony in this hearing. After that testimony was heard by me and the applicants, the applicants brought in their proposed plan which calls for each railroad individually bringing in all of its cars destined to the various port industries, that a switch engine would then classify all of these cars according to the industry for which they were intended and outbound cars pulled from these industries by a switch engine would be placed on these yard tracks, classified on separate tracks for pulling by each of the roads.

In other words, the proposal of the applicants is that the tracks located on port property are to be used as receiving tracks, outgoing tracks, classification tracks and switching tracks.

If this matter is handled as proposed by the applicants, that is, that each of the applicants will pull into the yard and take its cars from the yard, and if the Rock Island would become a party to the arrangement if the applicants are successful in their applications to the Commission, it would mean that one track would have to be set aside as a [fol. 4708] receiving track for each of the railroads and one track would have to be set aside for an outgoing track. One track in addition would have to be kept clear for a run-around track.

This would mean that a total of 15 tracks in the yard would be needed for receiving and departing tracks and

the run-around track. This yard has only ten tracks and is not adequate for efficient use by several railroads.

During periods of the lightest traffic in the Port District, as the Port District is now constituted, this might be done. During slack periods while we have been switching, the Rock Island has taken its cars to the Port area without classifying them and has classified them on Port tracks.

In my opinion during the eight months period when the navigation season is open and on some other occasions during the non-navigation season this would be impossible unless the tracks of the Port District were lengthened and the yard expanded by the addition of many new tracks.

Such addition of many yard tracks at this point would vastly decrease the amount of property available for use by the Port and if the traffic would reach such a point that the lengthened tracks and the additional tracks would be required and the applicant railroads handled the additional traffic, they would find their single track entrance even more congested coming to and going from the Port District.

Mr. Cohen has stated that the classification should take [fol. 4709] place on tracks adjacent to the District.

The tracks adjacent to the District on the west are the Rock Island tracks and with a north and south entrance to the Port the cars can be assembled, classified and moved to and from the Port without placing the burden upon the port tracks which the applicants propose.

Rock Island will not only have two direct entrances to the Lake Calumet Port area, but also will have switch yards at 124th Street, 115th Street, 97th Street, and South Chicago, all of which yards can be reached easily by a switch engine.

Recognizing the need for adequate yard facilities, in close proximity to the Lake Calumet Port area, the Rock Island Railroad will construct a yard with 412 car capacity south of the present Rock Island 115th Street Yard in the vicinity of 124th Street.

This new yard, together with the present 115th Street Yard, will be used for switching and classifying these cars

for delivery to the various railroads and for delivery to the Port industries.

Furthermore, it will permit the access of all cars to the Port and immediate placement of cars from the Port on interchange tracks available to the I. C., C. S. S. & S. B., N. Y. C., I. H. B., B. R. C. and for direct movement to the P. R. R. Colehour Yard with Rock Island switch power. In addition, if the need arises, we can construct additional [fol. 4710] tracks with a capacity of 1100 cars for storage at 124th Street.

From the south entrance to the proposed 124th Street Yard to the entrance to the Port Yard by the Rock Island Railroad is approximately 7400 feet. Thus, with Rock Island operation, cars would be classified outside of the Port area both for delivery to industries and for delivery to connecting carriers. Operations carried on by the Rock Island inside the Port area would be confined solely to such switching operations as would be required to place cars at industries, pull cars from industries and take the cars out of the Port area.

When the tracks of the Port are extended to 107th Street, at which point they will connect with Rock Island elevated crossing over Doty Avenue, then a north and south entrance will be afforded the Port which will provide an ideal situation with the greatest flexibility for handling cars to and from the Port.

With the north entrance, the 97th Street Yard and the large Rock Island South Chicago yard will be brought closer to the District by a distance of two miles. The Rock Island will then have the ability to enter the Port or leave the Port from both directions.

By Mr. Bordes:

Q. Mr. Gilfillan, would you kindly look at Exhibit H122 for a moment, please?

I direct your attention to the south end of Lake Calumet bearing the legend "Proposed switch for track leading off [fol. 4711] of Chicago, South Shore & South Bend to Lake Calumet."

I notice that you have at that point four or five different colors from the Kensington interlocker down into the Port. Do you see that?

A. Yes.

Q. You don't mean to infer by that, do you, that these are all separate tracks, that each one of those marks or each one of those colors indicates a separate track?

A. No. The colors merely indicate the different railroad routes. All of the colors shown thereon are railroads using the route over the two main tracks of the K. & E. between 116th Street and the proposed switch leading off the K. & E. into the Port.

Q. On the single track leading into the Port?

A. That is correct.

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[fol. 4712] R. C. DAVIDSON, was sworn and testified as follows:

Direct examination.

By Mr. Guandolo:

• • • • • • •

[fol. 4713] A. My name is R. C. Davidson, my business address is LaSalle Street Station, 139 West Van Buren Street, Chicago, Illinois.

Prior to March 1, 1955, I was employed with the Rock Island as Freight Traffic Manager in charge of Administrative Matters in the Rock Island Freight Traffic Department.

After my retirement I was asked to prepare testimony and to testify in this case. I have been in the railroad business since 1904, a period of 51 years. All of my experience throughout these years has been in Freight Traffic and all with the Rock Island. During this time I served in various capacities, but particularly in the following official positions:

Assistant General Freight Agent, General Freight Agent, Assistant Freight Traffic Manager, Freight Traffic Manager.

My experience has embraced all types of freight traffic work, including studies of branch and secondary main lines to determine their value to the railroad from a revenue standpoint and to develop the traffic potential of proposed extensions of the railroad to aid management in determining whether they should be made.

The Rock Island lines serve an extensive and important [fol. 4714] segment of the midwest and southwest.

Exam. Albus: The next exhibit number is H124 for identification.

(Exhibit H124, Witness Davidson, marked for identification.)

The Witness: My Exhibit H124 submitted now shows the lines of the railroad which operates approximately 7600 miles of road in 14 states. One of its eastern termini is in Chicago.

The railroad then runs westward across Illinois to the Mississippi River at the Quad Cities, East Moline, Moline, Rock Island, Illinois and Davenport, Iowa with a line from Bureau, Illinois down to Peoria, Illinois. Heavy mileage is operated in Iowa with lines out to South Dakota and up to the Twin Cities, Minneapolis and St. Paul, Minnesota.

Then there is the Denver line running west through Des Moines, Iowa, Omaha, Lincoln, Nebraska to Denver and Colorado Springs, Colorado, where connection is made with western connections on Transcontinental business, Intermountain and Mountain Pacific.

Of course, the Rock Island is one of the principal carriers serving the Kansas City Gateway with lines running through Kansas City, Missouri and to the southwest where the railroad ties in with the Southern Pacific at Santa Rose, New Mexico to form a transcontinental line to the west coast. The other main direction of the railroad is to [fol. 4715] the south through Oklahoma to Ft. Worth and Dallas, Texas and on down to Houston, Texas City and Galveston, Texas. You will note also a line from Tucum-

cari, New Mexico through Amarillo, Texas and Oklahoma City, Oklahoma to Memphis, Tennessee and a line down from Little Rock through Alexandria, Louisiana to Eunice, Louisiana.

We also have a line from Kansas City, Missouri to St. Louis, Missouri. As such, the Rock Island serves the vast middle west plains territory from Lake Michigan and the Chicago Gateway through the Kansas City Gateway to the Rocky Mountains on the west, and from the Twin Cities on the north to the Texas Gulf Coast on the south.

Our territory produces a very diversified tonnage—Products of Agriculture, Animals and products, Products of Mines, Products of Forests and Manufactured commodities. The commodities comprising the principal volume are wheat, coarse grains, soya beans and their products; meat and packinghouse products, plus the numerous products of industrial plants of which the following are a few; cement, agricultural implements, washing machines and machinery in general.

The Rock Island serves most of the important agricultural areas in the territory traversed and most of the principal cities.

In a word, the railroad serves the breadbasket territory of the United States which is becoming more diversified year to year, and growing industrially.

[fol. 4716] The company serves important Gateways on the east, at Chicago, Joliet and Peoria, Illinois; St. Louis, Missouri; Memphis, Tennessee; and on the west at Denver and Colorado Springs, Colorado; and Tucumcari, New Mexico and on the north the Twin Cities of St. Paul and Minneapolis, Minnesota. I might also mention the important gateways such as Fort Worth, Dallas, Amarillo, Texas and Eunice, Louisiana which are to the south.

The Rock Island has over 200 interchange points with connecting lines, enabling competitive participation in the movement of business requiring joint line hauls. The location of our railroad and gateways which it serves permits us to participate in volume traffic moving to or from the

many states lying west of the Great Lakes and the Mississippi River to the Pacific Ocean and the Gulf.

The Lake Calumet Port—Chicago Regional Port District—is situated on Lake Calumet. At present, the facilities adjoin to the west the warehouse and the dock facilities of the Calumet Harbor Terminal, Inc. which has been served by the Rock Island solely since the railroad took over the operations of the Pullman Railroad, January 1, 1950, under authority of this Commission *in Pullman Railroad Company, Control, etc., Finance Docket 16252.*

The Pullman Railroad alone served the Calumet Harbor Terminal, Inc., prior to January 1, 1950.

[fol. 4717] Exhibit H88 which was offered in evidence by Mr. Pritchett is a copy of the Commission's Report and Order in Pullman acquisition case which shows:

(a) That the Illinois Central Railroad, Kensington & Eastern Railroad, New York Central Railroad, Indiana Harbor Belt Railroad, Chesapeake and Ohio Railway and Belt Railway of Chicago were interveners, and

(b) The position taken by each with regard to the Pullman Purchase by the Rock Island.

The position of the Illinois Central included a request that any authority granted by the Commission be made subject to the condition that within 30 days of the date of the order, the Rock Island should tender to the Illinois Central the option to acquire the line and land of Pullman south of 124th Street upon fair and reasonable terms subject to the Commission's approval. If this request had been granted the Illinois Central would have served the southwest side of the lake exclusively, and the Rock Island would have had no tracks there.

The Commission in its decision made specific reference to this request, stating it did not find the record supported the contention of the Illinois Central that the Pullman property should be divided and that the Illinois Central

should be tendered an option for the portion south of 124th Street.

[fol. 4718] The Belt asked to be allowed to purchase the entire railroad alone. The others did not oppose the purchase provided that if conditions were attached for the benefit of others, they desired the same benefits.

No intervenor made application to be included jointly with the Rock Island in acquiring the Pullman.

Prior to acquisition by the Rock Island the Pullman Railroad served as an industrial switching road, giving service to Belt Lines and trunk lines serving the area. The Rock Island in taking over the Pullman Railroad outlined its purpose to continue operation of the Pullman and to maintain service to other railroads as was done when the property was operated independently.

The Commission, in its report in approving acquisition by the Rock Island, expressed cognizance of those facts and anticipated that the development of the port facilities might be extensive in character and would be involved in the service to be rendered by this switching facility under Rock Island operation.

The rail port of the rail-lake water traffic to and from the port, will be principally from or to the Western States served by or via the Rock Island and other western railroads, whereas the water haul, via the Great Lakes and/or Seaway either domestic or foreign commerce, will be competitive with Eastern Railroads.

[fol. 4719] So it seems obvious the Rock Island service is complimentary to the port area whereas the applicant Eastern Railroads have antagonistic interests bearing especially in mind that they compete with the water route east of Chicago. I refer to the Pennsylvania and the New York Central as individual applicants.

The decision of the Rock Island to acquire the Pullman Railroad was influenced by the availability of property suitable for industrial purposes, which the Rock Island badly needed, and further by the conviction that the proposed St. Lawrence River—Great Lakes Seaway would ul-

timately come into being, and that Lake Calumet constituted a logical location for the expansion of the Chicago Port to handle volume traffic moving via the Great Lakes or through the Calumet Sag Canal.

This foresight brought rewards when the Chicago Regional Port District selected this location for the Lake Calumet Port.

Work started on the enlarged Lake Calumet Harbor Port into the Fall of 1955 and construction work is still in progress. Twin 6½ million bushel grain elevators are completed and a total of four warehouses have been built to date.

As business concerns become tenants of the Chicago Regional Port District facilities and which tenant's activities are not confined to water traffic alone but are open to rail movements inbound or outbound, these tenants are and [fol. 4720] have been given an industrial status by the Rock Island, the names of such industries being listed as Rock Island Industries in Freight Tariffs on file with the Interstate Commerce Commission.

This has been accomplished by suitable amendments to the Directory of Industies issued by Agent R. G. Raasch, his Freight Tariff 22-B, ICC No. 842 and by the Rock Island in its Switching Tariff 21432-X ICC C-13518.

This action accords to these industries the benefit of existing freight rates, rules and regulations, applicable on traffic moving via road haul carriers into Chicago as well as outbound from Chicago; likewise accords such Port industries the benefit of through rates applicable on intra-terminal or cross-town movements requiring single or joint hauls between industries in the Chicago Switching District.

The general rate application, applying to all industries alike, dates back to the consummation in 1910 of the so-called Lowry Agreement, the product of negotiations between certain shipper organizations and the various Railroads entering the City of Chicago and designed to accomplish unification of practices with respect to switching rates and rules to apply within the Chicago District.

Conversely this gave to every industry in Chicago rail service by every railroad in Chicago.

Exam. Albus: The next exhibit will be Exhibit H125 for [fol. 4721] identification.

(Exhibit H125, Witness Davidson, marked for identification.)

The Witness: Exhibit H125 is a copy of the Lowry Agreement.

By this agreement each road haul carrier was afforded the opportunity of reaching industries served by other Chicago Railroads by the absorption of divisions or allowances of terminal line or lines. Chicago Switching Committee Tariff 20-Y—ICC No. 702 issued by R. G. Raasch, Agent—Illinois Freight Association, Tariff Bureau contains the current rules and regulations, applicable upon line haul traffic to and from Chicago.

The divisions or allowances referred to above were, in the main, the result of agreements by the Chicago District Railroads when the Lowry Agreement was put into effect. Prior to that time a chaotic situation prevailed due to the lack of uniformity in the measure of terminal carrier's switching charges and in the rules of road haul carriers as to the absorption thereof.

The measure of divisions or allowances which were agreed to under the new agreeemnt and absorbed by road haul carriers reflect a reciprocal idea and were applicable regardless of the length of service performed by terminal line.

Exam. Albus: The next exhibit will be H126 for identification.

[fol. 4722] (Exhibit H126, Witness Davidson, marked for identification.)

The Witness: My Exhibit H126 is a comparison of terminal allowances which Chicago railroads presently receive for performing terminal service on industry traffic involv-

ing a road haul by another railroad, and which allowances are absorbed by the road haul carriers.

These allowances cover the handling of load in one direction and the empty car in the reverse direction. The general basis applicable to commodities other than grain, railroad rolling stock, locomotives, sand, gravel and stone, accords the terminal carrier an amount in cents per 100 pounds based upon a minimum weight of 60,000 pounds per car. The allowance upon the other types of traffic are upon a car basis.

Some railroads receive higher allowances than do other lines. Generally speaking the measure of allowances falls into two levels.

The allowances received by the Rock Island are at the low level, whereas those received by the Belt Railway and the Indiana Harbor Belt are at a high level. The allowances of the Chicago, South Shore and South Bend, New York Central and the Pennsylvania roads are at the low level, only when the Chicago Great Western, Gulf, Mobile and Ohio, Illinois Central, Monon, Soo Line or Rock Island perform the road haul service, but are at the high level when other railroads haul the traffic. When the Illinois [fol. 4723] Central performs the terminal service that line receives the same allowances as those of the Rock Island or at the low level.

Page 1 of my Exhibit H126 covers carload traffic generally. At the foot of page 1, is shown the differences reflected in cents per hundredweight and per car of 60,000 pounds the Rock Island allowances are lower than allowances of some other lines.

For example, if a western road haul line gives a car of general traffic to the Rock Island or the Illinois Central to move to an industry of either of those lines, the western road haul line pays the Rock Island or the Illinois Central $21.54 per car that is based upon 60,000 pounds per car.

If the western road haul line gives the car to the Belt or the Indiana Harbor Belt, the western line pays $28.80 per car.

The allowances by other terminal carriers depend upon the particular line which performs the line haul, that is to say, the Pennsylvania, New York Central or the South Shore as terminal lines would receive from western lines, the following allowances per car—from the Chicago Great Western, Gulf, Mobile & Ohio, Illinois Central or Soo Line $21.54 per car; from the Atchison, Topeka and Santa Fe, Chicago, Aurora and Elgin and Wabash $28.80 per car.

Page 2 of the same Exhibit H126 shows the allowances [fol. 4724] applicable on grain. Here again it will be noted the Rock Island allowances per car are at the low level.

The matter of allowances means simply this—that where direct interchange if employed by the road haul and terminal carriers, the terminal expense borne by road haul carriers is at the minimum when the Rock Island performs the terminal service; conversely when the allowance of the terminal carriers is at a level higher than that of the Rock Island the road haul carrier is obliged to absorb greater terminal expenses.

When either the Chicago, Aurora & Elgin Railway, Chicago Great Western Railway, Gulf, Mobile & Ohio Railroad, Chicago & North Western Railway, or Chicago, Milwaukee, St. Paul & Pacific Railroad performs the road-haul, such line absorbs the terminal allowances of the Rock Island plus the charge assessed by the line performing the intermediate service which at the present time is $12.81 for a loaded car and $6.41 for the empty car.

A reciprocal idea also was reflected in the establishment of freight tariffs applicable, to intra-terminal or cross-town movement of carload traffic generally by the industries within the Chicago Switching District—an area of approximately 40 miles in length and from 12 to 15 miles in width.

To state this intra-terminal application more specifically, [fol. 4725] the railroads concluded it appropriate to set a charge for single line hauls and a charge for joint line hauls which would, generally speaking, apply within the entire switching district, regardless of the distance involved.

The present general basis follows in cents per 100 pounds, at minimum weight of 60,000 pounds per car:

Single line hauls—8½ cents per hundredweight, equal to $51.00 per car

Two line hauls—9½ cents per hundredweight, equal to $57.00 per car

Three line hauls—10½ cents per hundredweight, equal to $63.00 per car

Lower rates are published upon certain low grade commodities. The single line rates are published for the Rock Island in Rock Island Switching Tariff 21432X, ICC-C-13518; other lines publish their single line rates in their individual tariffs on file with the I.C.C. Joint haul rates are published in Illinois Freight Association Tariff 21, Agent R. C. Raasch's ICC 867.

The foregoing rates are the result of those prescribed by the Interstate Commerce Commission in Docket 19610, as amended, by ICC Ex Parte 123, 162, 166, 168, 176, 196, 206 and 206-a.

Exam. Albus: The next exhibit is H127 for identification.

[fol. 4726] (Exhibit H127, Witness Davidson, marked for identification.)

The Witness: My Exhibit H127 is a table of rate bases designating rates applicable upon loaded cars between industries with individual or private side tracks, at points in the Chicago Switching District, covering joint line movements between rail carriers, which are applicants in the cases now before the Commission and their connecting lines, compared with the rate bases of the Rock Island with its connecting lines.

Where two railroads are involved, the cross town rates divide 50 per cent to each road; where three lines are involved, the originating and terminating lines receive 37½ per cent and the intermediate line 25 per cent; the empty car is handled free.

Applicants in these cases now before the Commission seek certificates permitting the extensions of their lines of railroad to reach the enlarged Lake Calumet Port.

Originally, the Belt Railway Company of Chicago (Finance Docket 19391), and the Michigan Central-New York Central-Indiana Harbor Belt Railroads (Finance Docket 19448) filed applications with the Commission to obtain authority to construct trackage to gain access to the Lake Calumet Port. Application F.D. 19391 has been withdrawn but application F.D. 19448 has not been withdrawn.

The present purpose of the Belt Railway Company in [fol. 4727] this proceeding (F.D. 19742) is to obtain trackage rights over the proposed route of the Illinois Central-Kensington & Eastern-Philadelphia, Baltimore and Washington and the Pennsylvania Railroads (F.D. 19538).

Michigan Central, New York Central and Indiana Harbor Belt not only are attempting in this proceeding (F.D. 19921) to obtain trackage rights over the proposed route of the Illinois Central-Kensington & Eastern-Philadelphia, Baltimore and Washington and Pennsylvania Railroads, but have not withdrawn the application in F.D. 19448.

Certain petitions were filed in Finance Dockets 19391 and 19448 with the Interstate Commerce Commission which have a significant bearing upon the issues before the Interstate Commerce Commission. I refer to petitions filed by the Illinois Central, Kensington & Eastern Railroads and Chicago, South Shore and South Bend for leave to intervene in both Finance Dockets 19391 and 19448 asking the right to intervene; page 3 of the Illinois Central and Kensington and Eastern Railroads intervening petitions in both dockets contain the following:

> "Your petitioners' lines are situated in close proximity to the property of the Chicago Regional Port District. They are greatly interested in the development of the Port District and expect to participate in the future traffic moving to and from the Port District. They have for some time participated in and will continue

[fol. 4728] to participate in discussions and conferences relating to future rail service to the Port District. The granting by the Commission of this application would affect existing competitive rights in this territory and would permit applicants to inaugurate service into territory which petitioners expect to serve."

and the intervening petition of the Chicago, South Shore and South Bend in Finance Docket 19391 contains the following:

"Your petitioner's lines are situated in close proximity to the property of the Chicago Regional Port District. Petitioner is greatly interested in the development of the Port District, and expects to participate in the future traffic moving to and from the Port District. It has for some time participated in and is continuing to participate in discussions and conference relating to future rail service to the Port District. The granting by the Commission of this application of the Belt Railway Company of Chicago would affect existing competitive rights in this territory and would permit the applicant to extend its railroad into territory which petitioners expect to serve."

Also, the intervening petition of the Chicago, South Shore and South Bend in Finance Docket 19448, page 3 of which reads as follows:

"Your petitioner's lines are situated in close proximity [fol. 4729] to the property of the Chicago Regional Port District. It is greatly interested in the development of the Port District, and expects to participate in the futuer traffic moving to and from the Port Districts. It has for some time participated in and is continuing to participate in discussions and conferences relating to future rail service to the Port District. The granting by the Commission of this application would

affect existing competitive rights to inauguarate service into territory which petitioners expect to serve."

I also refer to petitions filed by the Michigan Central-New York Central-Indiana Harbor Belt Railroads for leave to intervene in Finance Dockets 19391 and 19538—19538 is the application of Pennsylvania, Illinois Central, and Chicago, South Shore and South Bend Railroads which in paragraph III contains the following:

"Petitioners oppose the application filed under Section 1(18) of the Interstate Commerce Act on the grounds, among others, that they will serve, and plan to serve, adequately the Chicago Regional Port District; that they propose and are prepared to expend sums of money to place themselves in a position to serve said Chicago Regional Port District adequately; that they are capable of performing adequate service in the future to meet the rail transportation needs of the [fol. 4730] Chicago Regional Port District; that there is no reason supported in law for applicant's extension of its line of railroad to serve territory contemplated to be served adequately by your petitioners; that they are greatly interested in the development of the Chicago Regional Port District and expect to participate in the future traffic moving to and from the Port area; that they have for some time participated in and will continue to participate in conferences relating to future rail service to the Port area. They have at this time pending before this Commission a joint application for authority to construct an extension of line into the Calumet Harbor Area which is assigned Interstate Commerce Commission Finance Docket No. 19448. The granting by this Commission of this application would affect existing competitive rights in this territory and would permit the applicant to inaugurate services in the territory which petitioners expect to serve."

In order that the issues in Finance Docket 19391 be in evidence in the case presently before the Interstate Commerce Commission I introduce at this time Exhibit—

Exam. Albus: The next exhibit will be Exhibit H128 for identification.

[fol. 4731] (Exhibit H128, Witness Davidson, marked for identification.)

The Witness: I introduce at this time Exhibit H128, Finance Docket 19391 (Belt Railway Case)—Application, all petitions and ICC Orders issued to date.

The proposed route which the applicants plan to use to reach Lake Calumet Port involves the construction of some trackage and the use of wheelage or trackage rights over rails of other carriers. These trackage arrangements differ as between individual applicants and as to the volume of traffic handled per year, one basis for the first 7000 units and another basis for units over 7000 handled per year. The charges apply to cars loaded or empty and for diesel locomotives per trip.

In addition to these trackage charges, a letter dated November 6, 1956, which President and General Manager L. A. Evans of the Belt Railway Company of Chicago addressed the Board of Directors states that a separate charge approximating $5.00 per car loaded or empty, will be made for the handling of cars within the Port. It would seem that this charge would apply to all railroads.

I introduce this letter as Exhibit H129.

Exam. Albus: That document will be marked as Exhibit H129 for identification.

[fol. 4732] (Exhibit H129, Witness Davidson, marked for identification.)

The Witness: I introduce this letter as Exhibit H129.

These trackage and port terminal expenses must be absorbed by the applicant handling business to and from the port, and such expenses necessarily must be charged against

the terminal allowance or division which the applicant line receives, either as applying to traffic receiving a road haul by one or more connecting lines or upon Chicago Switching District cross-town business.

Our analysis of the situation impelled the preparation of a series of Exhibits so that the Commission would be advised of the remaining revenue which the applicants, as terminal carriers, will have for service, to or from connections, upon either road-haul traffic or cross town movements, after absorbing trackage or wheelage and port terminal costs out of their allowances or division.

The Terminal allowances for road haul traffic as well as the basis of dividing freight charges, upon cross town traffic employed here, represent the allowances or basis of divisions applicable via each respective applicant to or from their industries, generally.

The first series of Exhibits, six in number, one for each applicant railroad, shows as applied to Chicago Switching District cross town traffic, the freight charge upon a mini-
[fol. 4733] mum car (60,000 pounds), presently applicable, as well as the revenue received by the applicant, contrasted with the situation which would result by the respective applicants directly serving Lake Calumet Port Industries by using tracks of other railroads to reach such industries.

Mr. Guandolo: Could you read the sentence to which you have reference, Mr. Davidson?

The Witness: The reference is contained in the first paragraph on page 3 towards the bottom of the paragraph and it reads:

"In addition to these changes totalling $6.75 per car loaded or empty for trackage rights, there will be an additional charge of approximately $5.00 per car loaded or empty to the Belt for the handling of cars within the Port."

Mr. O'Brien: May we have the next sentence read, please?

The Witness: I was going to read that.

"The latter figure represents only an estimate inasmuch as we have no definite information as to the operation of the railroads within the Port."

Exam. Albus: The next exhibit will be H130.

(Exhibit H130, Witness Davidson, marked for identification.)

The Witness: Exhibit H130 identified as cross-town Belt-Rock Island-Industries shows the situation via Belt [fol. 4734] Railway. Sheet three setting forth two examples, (A) A loaded car moving into Lake Calumet Port Industries and the same car unloading, reloaded outbound from Lake Calumet Port Industries.

(B) A loaded car moving into Lake Calumet Port Industries and the same car released and handled empty outbound. Both of these examples show the balance of the Belt Railway revenue for trackage and port terminal cost are absorbed.

Exam. Albus: The next exhibit will be H131 for identification.

(Exhibit H131, Witness Davidson, marked for identification.)

The Witness: Exhibit H131 identified as cross-town Pennsylvania-Rock Island Industries, applies for the Pennsylvania Railroad as an applicant. It is prepared in the same manner as the one for the Belt Railway and sheet three shows the balance of the Pennsylvania revenue after absorbing trackage and port terminal cost.

Exam. Albus: The next exhibit will be H132 for identification.

(Exhibit H132, Witness Davidson, marked for identification.)

The Witness: Exhibit H132 identified as cross-town Illinois Central-Rock Island Industries covers the Illinois Central as an applicant. The amount of revenue left after

the Illinois Central absorbs the trackage and port cost un-
[fol. 4735] der both examples are shown on sheet three.

Exam. Albus: The next exhibit will be H133 for identification.

(Exhibit H133, Witness Davidson, marked for identification.)

The Witness: Exhibit H133 identified cross-town South Shore-Rock Island Industries applies account Chicago, South Shore and South Bend as the applicant and from that line's industries. Again examples A and B on sheet three show the balance of the South Shore revenue after absorption of trackage and port terminal cost.

Exam. Albus: The next exhibit will be H134 for identification.

(Exhibit H134, Witness Davidson, marked for identification.)

The Witness: Exhibit H134 identified as cross-town IHB-RI Industries covers the Indiana Harbor Belt as the applicant. The amount of revenue left after the Indiana Harbor Belt absorbs the trackage and port cost under both examples are shown on sheet three.

Exam. Albus: The next exhibit will be H135 for identification.

(Exhibit H135, Witness Davidson, marked for identification.)

The Witness: Exhibit H135 identified as cross-town New
[fol. 4736] York Central-Rock Island Industries applies for account the New York Central as the applicant. Examples A and B on sheet three shows the balance of the New York Central revenue after absorbing trackage and port terminal cost. Although the foregoing shows the Burlington by name, figures applicable to it apply equally to all railroads with which an applicant has a direct connection and the picture would be same as that applying to the GM&O if the applicant did not have a direct connection.

Since a variation exists upon road haul traffic in the measure of the terminal allowance of applicants, the following exhibits show the situation for each applicant carrier when the road haul is performed by a limited number of railroads.

Exam. Albus: The next exhibit will be H136 for identification.

(Exhibit H136, Witness Davidson, marked for identification.)

The Witness: Exhibit H136 identified as "Road-haul Belt Industries", shows the terminal allowances which would be received by the Belt Railway, upon traffic between Lake Calumet Port Industries if served by that line, on the one hand, and road haul points on or via either the Chicago, Burlington & Quincy, Chicago Great Western or Gulf, Mobile and Ohio, on the other hand.

The exhibit shows trackage expense which the Belt would [fol. 4737] assume as well as an estimated terminal expense upon the property of the Chicago Regional Port District, and finally the amount of revenue which the Belt Railway would have for performing its transportation services after assuming the trackage and port terminal expenses.

The second sheet of this exhibit applies to carload traffic generally, excluding grain. It is self-explanatory except that I desire to call attention to the last tabulation at the foot of the page.

Note that the balance of the Belt Railway allowance, after assuming trackage and port terminal costs for the first 7000 units handled within an annual period, would be $17.05 per loaded car, provided the equipment was loaded in the opposite direction. If the car was handled loaded only in one direction the Belt Railway would have left after charges, $5.30.

Both of these figures $17.05 and $5.30 would be subject to some reduction if charged with a proportion of the diesel trackage expense. In the event the volume of traffic exceeded 7,000 units per annum, then the Belt would have remaining on the excess cars, after charges, $19.30 per loaded

car, provided the same equipment received a load in both directions, and $9.80 per loaded car if same equipment received an empty haul in one direction; these two figures also would be subject to some reduction if the diesel trackage expense is calculated on a car basis loaded or empty.

[fol. 4738] The picture would be the same if any western railroad performs the road haul. The Belt Railway allowance with eastern carriers upon a minimum car is $30.72 per car or $1.92 per car greater than with western lines, so via eastern lines the net result would be $1.92 per car higher than shown by the exhibit.

Sheet three of this exhibit applies to grain. The allowances here are, generally speaking, upon a freight car basis. Here the same trackage and port terminal costs are shown and the returns to the Belt after charges being set forth towards the foot of the page.

Due to some difference in the divisional arrangements as between road haul carriers, there is some difference in the final result. Speaking first as to the first 7,000 units, it will be observed that the Belt Railway, after trackage and terminal expense, would be in the red in varying amounts ranging from $.68 to $12.43 per car, except on outbound shipments receiving a road haul over the Gulf, Mobile and Ohio, the Belt Railway after charges and terminal costs would have $2.33 per car for its transportation service.

I want it clearly understood that where the exhibit reflects deficits ranging from $.68 to $12.43 per car, the Belt Railway would perform its transportation service between its connection with the road haul carrier and Lake Calumet Port for nothing, also, that only upon outbound road haul [fol. 4739] movements via the GM&O would a net amount ($2.33 per car) remain, for the delivery of the car to the GM&O, after the Belt Railway assumed, out of its terminal allowance, the trackage and port terminal costs.

Now as to over 7,000 units, here since the trackage expense is less than for the first 7,000 units, the losses are less, ranging from $4.92 to $7.93 per car, the net figures be-

ing either $1.57 or $4.58 per car. Some of the deficits which would occur when the movements are less than 7,000 units per year are converted into slight pluses when over 7,000 units are handled.

All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip.

If the Atchison, Topeka and Santa Fe, Chicago and North Western Railway, or Chicago, Milwaukee, St. Paul and Pacific, or any other western line were the road haul lines, the picture upon grain, inbound, would be the same as shown account the Chicago, Burlington and Quincy, the Chicago Great Western or the Gulf, Mobile and Ohio as road haul carriers, but upon grain which the Belt Railway handled outbound for road haul the situation would be different.

Via the Chicago and North Western or the Chicago, Milwaukee, St. Paul and Pacific and Soo Line, the net result for the Belt Railway would be the same as shown by the [fol. 4740] exhibit for either the Chicago, Burlington and Quincy or Chicago Great Western, but if the Atchison, Topeka and Santa Fe roadhauled the outbound grain, then the Belt Railway allowance would be $14.08 per car for the first 30 tons plus an excess charge of 47.01 cents per ton over 30 tons and the net result for the Belt Railway would be for 30 tons the same as shown for the Gulf, Mobile and Ohio.

I will introduce later, an exhibit showing the situation as applied to grain, outbound to the east, via respective applicants serving as terminal carriers at Lake Calumet Port.

Exam. Albus: The next exhibit will be H137 for identification.

(Exhibit H137, Witness Davidson, marked for identification.)

The Witness: Exhibit H137 identified as "Road-haul Penn Industries" shows the situation for the Pennsylvania Railroad if it served Lake Calumet Port Industries.

Page two applies to traffic generally, excluding grain, and is prepared in the same general fashion as the exhibit for account of the Belt Railway.

The tabulation at the bottom of the page shows the balance of the Pennsylvania allowance per car after assuming trackage and port terminal costs, ranging, in connection with the first 7,000 units, from a net of $3.04 to $19.55 per [fol. 4741] car; the amounts in connection with units in excess of 7,000 per annum are slightly higher.

If the Atchison, Topeka and Santa Fe, Chicago and North Western or Chicago, Millwaukee, St. Paul and Pacific performed the road haul the situation would be the same as via the Chicago Great Western or Gulf, Mobile and Ohio.

Sheet three applies to grain. The allowances vary as between road haul carriers and as between inbound or outbound movements; trackage charges are the same as shown on sheet one.

Towards the bottom of the page is shown the Pennsylvania Railroad allowance per car after assuming trackage and port terminal costs. Note the net result is similar to that in connection with my Belt Railway Exhibit.

In most instances the trackage expense exceeds greatly the per car terminal allowances of the Pennsylvania. The deficits per car range from $1.19 to as high as $10.44 per car, in connection with the first 7,000 units handled, and from 19 cents to $8.44 per car in connection with units over 7,000.

In no case would the net amount exceed $5.83 per car. All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip.

On inbound grain, if the Atchison, Topeka and Santa Fe [fol. 4742] or Chicago and North Western or Chicago, Milwaukee, St. Paul and Pacific were road haul lines, the situation would be the same as if the Chicago Burlington & Quincy were the road haul line.

If the Soo Line were the road haul line the situation would be the same as if the Chicago Great Western were the road haul line.

On outbound grain, if the Chicago and North Western or Chicago, Milwaukee, St. Paul and Pacific were the road haul line, the situation would be the same as via the Chicago, Burlington & Quincy, but if the Soo Line handled the shipments outbound, the situation would be the same as via the Chicago Great Western.

If the Atchison, Topeka and Santa Fe road hauled the outbound grain, then the Pennsylvania Railroad allowance would be $18.13 per car for first 30 tons plus an excess charge of 35.78 cents per ton over 30 tons and the net result for the Pennsylvania would be for 30 tons, first 7,000 units,—if car loaded in both directions—$8.88 per car, but if car handled empty inbound a deficit of $.37 per car would result; for over 7,000 units, if car loaded both directions, $9.88 per car, but if car handled empty, inbound, the Pennsylvania would have left to defray cost of delivery to the Atchison, Topeka and Santa Fe $1.63 per car.

Exam. Albus: The next exhibit will be H138 for identifi- [fol. 4743] cation.

(Exhibit H138, Witness Davidson, marked for identification.)

The Witness: The next, Exhibit H138, identified as "Road-haul Illinois Central Industries", applies for the Illinois Central. The tabulation at the bottom of sheet two, which applies to carload traffic generally, grain excluded, shows what the Illinois's Central would have left to cover transportation services after assuming wheelage, trackage and port terminal costs.

For cars loaded in both direction, the figures are $14.04 per car first 7,000 units and $15.29 per car for over 7,000 units, and if car received empty movement in opposite direction, the figures are $6.54 per car, first 7,000 units and $9.04 per car for over 7,000 units, and all of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip. The situation would be the same if any western railroad performed the road haul.

Sheet three covers grain. After wheelage, trackage and port terminal costs the Illinois Central would have left for the balance of the transportation service, if car received a load in both directions, first 7,000 units per year, $6.58 per car for an inbound load, 56 cents per car for an outbound load; for over 7,000 units per year, $7.83 per car if load [fol. 4744] moved inbound and $1.81 per car if load moved outbound.

Now if the car received an empty movement in the reverse direction, the Illinois Central would have deficits per car as follows, first 7,000 units per year, $.92 per car if load moved inbound, $6.94 per car if load moved outbound and for over 7,000 units per year a net figure of $1.58 per car if load moved inbound and a deficit of $4.44 per car if the load moved outbound.

All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip. The picture would be the same if any western railroad performed the road haul.

Exam. Albus: The next exhibit will be H139 for identification.

(Exhibit H139, Witness Davidson, marked for identification.)

The Witness: The next, Exhibit H139, identified as "Road haul-South Shore Industries", applies for the Chicago, South Shore and South Bend Railroad. The tabulation at the foot of sheet two, as applied to carload freight, excluding grain, shows the Chicago, South Shore and South Bend Railroad allowances after deducting the trackage and port terminal costs.

The results are different when the Chicago Burlington and Quincy performs the road haul service than when the road haul service is performed by either the Chicago Great [fol. 4745] Western or Gulf, Mobile and Ohio, due to the difference in the terminal allowance of the Chicago, South Shore and South Bend.

When the Chicago, Burlington and Quincy performs the road haul and the car received a load in both directions, the Chicago, South Shore and South Bend revenue after trackage and port cost would be for first 7,000 units per year, $21.05 per car, and for over 7,000 units $22.30 per car, but if car received an empty movement in the reverse direction, the Chicago, South Shore and South Bend would receive for first 7,000 units, $13.30 per car and for over 7,000 units $15.80 per car.

When either the Chicago Great Western or Gulf, Mobile and Ohio performed the road haul and the car received a load in both directions, the Chicago, South Shore and South Bend revenue after trackage and port cost would be for the first 7,000 units $13.79 per car and for over 7,000 units $15.04 per car, but if car received on empty movement in reverse direction, the Chicago, South Shore and South Bend would receive for first 7,000 units $6.04 per car and for over 7,000 units, $8.54 per car.

All of these figures would be subject to further trimming if charged a per-car proportion of the diesel trackage expense per trip.

If the Atchison, Topeka and Santa Fe, Chicago and North Western or Chicago, Millwaukee, St. Paul and Pacific performed the road haul the situation would be the same as via [fol. 4746] the Chicago, Burlington & Quincy. If the Soo Line performed the road haul, the situation would be the same as via the Chicago Great Western or Gulf, Mobile and Ohio.

At the bottom of sheet three is shown the net result with respect to grain traffic. Here again the results differ as between the road haul carriers.

It will be noted the situation is different from what is shown on the exhibits for other applicants only in matter of degree—only where car receives a load in both directions is there a net balance via any of the routes and the highest figure (via the Gulf, Mobile and Ohio) is $7.58 per car.

When the car receives an empty haul in the reverse movement there is a deficit ranging from $1.42 per car to

$7.44 per car except when the load moves outbound via the Gulf, Mobile and Ohio when the net balance is $1.08 per car.

All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip.

On inbound grain, if the Atchison, Topeka and Santa Fe or Chicago and North Western or Chicago, Milwaukee, St. Paul and Pacific were road haul lines, the situation would be the same as if the Chicago, Burlington and Quincy were the road haul line. If the Soo Line were the road haul line the situation would be the same as if the Chicago Great [fol. 4747] Western were the road haul line.

On outbound grain, if the Chicago and North Western or Chicago, Milwaukee, St. Paul and Pacific were the road haul lines, the situation would be the same as via the Chicago, Burlington & Quincy, but if the Soo Line handled the shipments outbound the situation would be the same as via the Chicago Great Western.

If the Atchison, Topeka and Santa Fe roadhauled the outbound grain then the South Shore allowance would be $18.13 per car for first 30 tons plus an excess charge of 35.78 cents per ton over 30 tons and the net results for the South Shore would be for 30 tons, first 7,000 units, if car loaded in both directions, $10.38 per car, but if car handled empty inbound the net result for the South Shore would be $2.63 per car.

For over 7,000 units, if car loaded in both directions, the balance of the South Shore allowance would be $10.96 per car, but if car handled empty inbound, the South Shore would have left to defray cost of delivery to intermediate line used to reach the Santa Fe, $4.46 per car.

Exam. Albus: The next exhibit will be H140 for identification.

(Exhibit H140, Witness Davidson, marked for identification.)

The Witness: Exhibit H140 identified as "Road-haul IHB Industries" shows the situation for the Indiana Harbor Belt

[fol. 4748] Railroad, if it served Lake Calumet Port Industries.

Sheet two which applies to traffic generally, excluding grain, shows what the Indiana Harbor Belt Railroad would have left to cover transportation services after assuming trackage and port terminal costs.

For cars loaded in both directions, the figures are $19.05 per car—first 7,000 units and $20.30 per car for over 7,000 units; if car received empty movement in opposite direction, the figures are $9.30 per car—first 7,000 units and $11.80 per car over 7,000 units.

All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip.

The situation would be the same with any western line; the Indiana Harbor Belt terminal allowance with eastern road-haul carriers, upon a minimum car, is $30.72 per car or $1.92 per car greater than with western lines, so via eastern lines the net result would be $1.92 per car higher than shown by exhibit.

Sheet three covering grain, shows that after assuming trackage and port terminal costs the IHB would have left for the balance of the transportation service, varying net amounts per car ranging from $1.32 per car to $9.63 per car and these when the car received a loaded movement in both directions.

[fol. 4749] Where the car handling the load received an empty movement in the reverse direction, then the trackage and port terminal cost expense would exceed the measure of the terminal allowance resulting in deficits ranging from $1.37 per car to $8.43 per car, the only exception being a net figure of 46 cents per car for over 7,000 units and when the outbound road haul was via the Gulf, Mobile and Ohio Railroad.

All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip.

Mr. Guandolo: Mr. Examiner, I wonder if the witness isn't getting a little tired.

Exam. Albus: Do you went to recess now?

Mr. Guandolo: Yes.

Exam. Albus: It is almost twelve o'clock.

Let the record show a recess until 2:30 o'clock. (Whereupon, at 12:00 o'clock noon a recess was taken until 2:30 o'clock p. m. of the same day.)

[fol. 4750] AFTERNOON SESSION

2:30 p.m.

Mr. Guandolo: I will recall Mr. Davidson for the purpose of having him continue with his testimony.

Exam. Albus: Proceed.

R. C. DAVIDSON having been previously sworn testified further as follows:

Direct examination (continued).

By Mr. Guandolo:

Q. Please continue with your prepared statement, Mr. Davidson.

A. All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip.

The situation reflected by this Exhibit on grain inbound would be the same as shown for the Chicago, Burlington and Quincy and Chicago Great Western if any other Western Railroad was the road haul line and on outbound Grain shipments via the following Western roads, Chicago and North Western, Chicago, Milwaukee, St. Paul and Pacific and Soo Line, the situation would be the same as via the CB&Q and CGW, but on outbound shipments via the Atchison, Topeka and Santa Fe, the situation would be the same as via the GM&O.

Exhibit H-141 identified as "Road-haul NYC Industries" shows situation for the New York Central RR. if it served Lake Calumet Port Industries.

[fol. 4751] Sheet two which applies to traffic generally, grain excluded, shows what the New York Central would have left to cover transportation services after assuming trackage and Port Terminal costs. When the Chicago, Burlington & Quincy is the road haul line, first 7,000 units —cars loaded in both directions—$19.05 per car but where car handling the load receives empty movement in reverse direction, $9.30 per car; for over 7,000 units, cars loaded in both directions, $20.30 per car but where car receives empty movement in reverse direction $11.80 per car. When either the Chicago Great Western or the Gulf, Mobile and Ohio is the road haul line, first 7,000 units, cars loaded in both directions $11.79 per; but where car receives empty movement in reverse direction $2.04 per car. For over 7,000 units cars loaded in both directions $13.04 per car, but where car receives empty movement in reverse direction $4.54 per car. All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip. If other Western Lines performed the road haul the situation would be different but via one or more of these Western Lines, the situation would be the same as reflected by the Exhibit for account either the DB&Q or the CGW or GM&O. The Terminal allowance of the NYC with Eastern road haul carriers, other than the Monon; upon a minimum car is $30.72 per car or $192 per car greater than with Western Lines also [fol. 4752] the Monon, so via Eastern Lines the net result would be $1.92 per car higher than shown by the Exhibit.

Sheet three covers grain—The tabulation at the foot of the page shows that deficits ranging from 44 cents per car to $11.44 per car would result after the New York Central, had charged against its terminal allowance, the cost of trackage and Port Terminal costs and that in such instances the expense for the balance of its transportation service would have to come from other sources; note fur-

ther that in instances where net figures result, they range from $1.32 to $5.58 per car. All of these figures would be subject to further trimming if charged with a car proportion of the diesel trackage expense per trip.

The situation reflected by the Exhibit (road haul via CB&Q) would also apply if the road haul were performed by the Chicago and North Western or Chicago, Milwaukee, St. Paul and Pacific, and the situation, reflecting Chicago Great Western as road haul line, would also apply if the road haul were performed by the Soo Line.

Now, if the Atchison, Topeka and Santa Fe were the road haul carrier upon grain moving into the port, the situation would be the same as when the Chicago, Burlington & Quincy brought the car into Chicago, but if the Atchison, Topeka and Santa Fe roadhauled the car outbound the Terminal allowance of the New York Central would be $18.13 per car (30 tons) and the net results for [fol. 4753] the New York Central would be $4.05 per car greater than the exhibit shows if the Gulf, Mobile and Ohio were the outbound road haul line.

I will now introduce a series of Exhibits applicable to cross town movements of carload traffic generally, between industries on either the Chicago, Burlington and Quincy, Chicago Great Western or Gulf, Mobile and Ohio, also Lake Calumet Port industries if served by the respective applicants. These Exhibits show the freight charges per car that would apply and how the charges would divide between participating carriers; also the wheelage or trackage expense, the port terminal cost and the revenue for the applicant remaining after assuming trackage and port terminal cost.

The first Exhibit H-142 identified as "Cross-town Belt" shows the Belt Railway as the terminal line at Lake Calumet Port Industries; after assuming trackage and port terminal costs the Belt Railway will have shrunk its $28.50 revenue per car to the figure shown in the last tabulation on Sheet two. If there were a load in both directions the balance of the Belt Railway revenue would be

$16.75 per car for the first 7,000 units and $19.00 per car for units in excess of 7,000, but if there is an empty movement in the reverse direction, then the balance of the Belt revenue would be $5.00 per car for the first 7,000 units and $9.50 per car for units in excess of 7,000. All of these figures are subject to some further trimming if charged with [fol. 4754] a per car proportion of the diesel trackage expense per trip.

Since the Belt Railway connects directly with the Atchison, Topeka and Santa Fe, the Chicago and North Western and the Chicago, Milwaukee, St. Paul and Pacific, the same picture would apply from industries on these three roads as shown by the Exhibits, account Chicago, Burlington and Quincy, Chicago Great Western and Gulf, Mobile and Ohio industries; it would also be the same account industries on any railroad with which the Belt Railway directly connects.

Exhibit H-143 identified as "Cross-town-Penn" shows the Pennsylvania Railroad as a terminal line at Lake Calumet Port. The amount of Pennsylvania terminal revenue after trackage and port costs is set forth in the tabulation at the bottom of Sheet two. Analyzed the $28.50 revenue earned by the Pennsylvania upon the cross-town move, would, for the first 7,000 units, be reduced to $19.25 per car if car received a load in both directions and $10.00 per car if car received an empty haul in reverse direction; for over 7,000 units per year, the balance of the Pennsylvania revenue would be $20.25 per car if car loaded in both directions and $12.00 per car if car moved empty outbound. All of these figures would be subject to further trimming if charged with a per car proportion of the diesel trackage expense per trip. The same situation as shown by the Exhibits would apply account industries on the Atchison, [fol. 4755] Topeka and Santa Fe, Chicago and North Western or Chicago, Milwaukee, St. Paul and Pacific, or any other Railroad with which the Pennsylvania directly connects at Chicago.

Exhibit H-144 identified as "Cross town Ill. Cent." shows the Illinois Central as a terminal line at Lake Calu-

(1) Traffic from connecting lines industries to Rock Island industries.

(2) Traffic from Rock Island industries to connecting line industries.

An analysis of the Summary shows that under SECTION A, a total of 763 Rock Island line haul car loads were handled upon which the Rock Island revenue equaled $150,-255.21. Every car represents a competitive shipment as no point west or south of Chicago was served exclusively by the Rock Island and some of the points were served only by lines other than the Rock Island. Consequently, all of [fol. 4767] this traffic and revenue earned by the Rock Island would be susceptible to loss.

The summary as to SECTION B, shows a total of 837 carloads on which other railroads had the line haul handled upon which the Rock Island terminal revenue equaled $18,339.04, all of which would be susceptible to loss if other lines were permitted to invade these Rock Island industries at the Calumet Harbor Port, because the Rock Island performed only terminal service.

The summary as to SECTION C, shows a total of 1202 carloads of cross-town switching to and from industries located on other lines handled upon which the Rock Island terminal revenue equaled $39,032.06. Since all of this traffic had origin or destination at industries located on other Chicago carriers, all the revenue earned by the Rock Island would be susceptible to loss if other lines were permitted to extend their lines of railroad to reach the port.

This exhibit embraces a grand total of 2803 cars of general traffic handled by the Rock Island in the year ending December 31st, 1955, upon which the Rock Island earned total revenue of $207,626.31. Now as to the Grain potential:

Until the erection of the twin 6½ million bushel elevators, Grain has not entered the picture at Lake Calumet

Port. Since Grain storage has not previously existed there, the volume of traffic and the revenue which would be de-
[fol. 4768] rived therefrom for the future is purely speculative. These twin elevators commenced operations in June of this year and we do have information regarding the operations for June, July and August, 1957. During the past three months, the two elevators handled inbound a total of 3053 cars of Grain and shipped outbound 516 cars of grain. This three months period, constituting as it does the beginning of the elevator company's operations is not an absolute criterion of the operations for a like period after (a) the St. Lawrence Seaway is completed, and (b) the operations of the elevators are in full swing. My Exhibit H-152 shows the movement of Grain for June, July and August 1957, receipts and shipments separately for the two elevators combined, the equivalent of cars handled in bushels (using 2,000 bushels per car) and finally the Rock Island revenue.

A full single capacity—one turn over—of the twin elevators is 13,000,000 bushels equivalent of 6,500 cars. It will be noted from this exhibit that during the three months a total of 3569 cars were handled, equivalent to 7,138,000 bushels or approximately 54% of the capacity.

If we should accept the showing for the months of June, July and August 1957, as a minimum showing via rail movement, for one full turn over of the two elevators, then the minimum amount of Rock Island revenue, upon grain alone, susceptible to loss annually would be $138,-
[fol. 4769] 338.39, or the total revenue shown in my Exhibit H-152.

Putting both types of traffic together, that is, traffic other than Grain as dealt with in my Exhibit No. 151 and Grain, based upon my Exhibit H-152, we have the following Summary—

Traffic, except Grain (Basic Year 1955) Cars: 2802; RI Revenue: $207,626. Grain: Turnovers: 1; Cars: 3569; Revenue: $138,338. All Traffic: Cars: 6371; Revenue: $345,964.

met Port. After assuming wheelage, trackage and port terminal costs the Illinois Central will have shrunk its $28.50 revenue per car to the figures shown in the last tabulation on Sheet two. If there were a load in both directions, the balance of the Illinois Central revenue would be, for the first 7,000 units, per year account Chicago, Burlington and Quincy industries, $21.00 per car, account Chicago, Great Western or Gulf, Mobile and Ohio industries $16.125 per car and for over 7,000 units, the balance of the Illinois Central revenue would be account Chicago, Burlington and Quincy industries $22.25 per car, account Chicago Great Western and Gulf, Mobile Ohio industries $17.375 per car. Now if the car handling the load received an empty haul outbound, then the balance of the Illinois Central revenue would be, first 7,000 units, account Chicago, Burlington and Quincy industries $13.50 per car, account Chicago Great Western and Gulf, Mobile and Ohio industries, $8.625 per car and for units over 7,000 per year, the balance of the Illinois Central revenue would be account Chicago, Burlington and Quincy industries $16.00 per car and account [fol. 4756] Chicago Great Western or Gulf, Mobile and Ohio industries $11.125 per car. All of these figures are subject to further trimming if charged with a per car proportion of the diesel trackage expense per trip. The same situation as reflected by the Exhibit for account the Chicago Great Western and Gulf, Mobile and Ohio industries would also apply account Atchison, Topeka and Santa Fe, Chicago and North Western or Chicago, Milwaukee, St. Paul and Pacific industries.

Upon the movement of traffic between industries on any Chicago railroad, upon the one hand, and Lake Calumet Port Industries on the other if served by the Illinois Central and where the Illinois Central applied the two line cross town rate, the net situation for the Illinois Central would be the same as this Exhibit reflects account movements of Chicago, Burlington & Quincy industries; but if movement took place between Lake Calumet Port Industries, if served by the Illinois Central, and industries on

any Chicago railroad reached by the Illinois Central via an intermediate carrier, the net situation for the Illinois Central would be the same as this Exhibit reflects for account movements of Chicago Great Western or Gulf, Mobile & Ohio industries.

Exhibit 145 identified as "Cross-town So. Shore", shows the situation if the Chicago South Shore and South Bend Railroad were a terminal line at Lake Calumet port. The Chicago, South Shore and South Bend requires an intermediate carrier to reach either the Chicago, Burlington [fol. 4757] and Quincy, Chicago Great Western or Gulf, Mobile and Ohio, therefore its proportion of the freight charges upon cross-town traffic is $23.625 per minimum car. After trackage and port terminal costs this figure would shrink as follows—If car received a loaded haul in both directions, for the first 7,000 units handled per year, the balance of the Chicago, South Shore and South Bend revenue would be $15.875 per car, but if car received empty haul outbound, the balance of revenue would be but $8.125 per car; for over 7,000 units per year, and provided car received load in both directions, the balance of the Chicago, South Shore and South Bend revenue would be $17.125 per car but if car received empty haul outbound the balance would be but $10.625 per car. Here again all of these figures would be subject to further trimming if charged with a per car proportion of the diesel trackage expense per trip. The same situation as shown by the Exhibit would also apply to movements account industries on the Atchison, Topeka and Santa Fe, Chicago and North Western or Chicago, Milwaukee, St. Paul and Pacific or most all other Chicago Railroads.

The next Exhibit H-146 identified as "Cross-town IHB", shows the Indiana Harbor Belt as a terminal line at Lake Calumet Port. After assuming trackage and port terminal costs the Indiana Harbor Belt will have shrunk its $28.50 revenue per car to figures shown at foot of Page 2—If there were a load in both directions, the balance of the [fol. 4758] IHB revenue would be, for the first 7,000 units,

per year $18.75 per car and for over 7,000 units, the balance of the Indiana Harbor Belt revenue would be $20.00 per car. If the car handling the load received an empty movement outbound, the balance of the revenue would be, for the first 7,000 units, $9.00 per car and for over 7,000 units $11.50 per car. All of these figures would be subject to some further trimming if charged with a per car proportion of the diesel trackage expense per trip.

The Indiana Harbor Belt connects directly with Chicago Railroads except the Manufacturers Junction Railway, so the same situation as reflected by this Exhibit would apply from industries on lines other than the Manufacturers Junction; the revenue received with the Manufacturers Junction Ry. would be lower than exhibit shows due to Indiana Harbor Belt earning less under a three line movement.

The next Exhibit H-147 identified as "Cross town-NYC", shows the New York Central as a terminal line at Lake Calumet Port. After assuming trackage and port terminal costs the New York Central will have shrunk its $23.625 revenue per car to the figures shown at foot of Page two.

If there were a load in both directions, the balance of New York Central revenue would be, for the first 7,000 units per year, $13.875 per car and for over 7,000 units, the balance of the New York Central revenue would be [fol. 4759] $15-125 per car. If the car handling the load received an empty movement outbound, the balance of the revenue would be, for the first 7,000 units, $4.125 per car and for over 7,000 units, $6.625 per car. All of these figures would be subject to some further trimming, if charged with a per car proportion of the diesel trackage expense per trip.

The above situation would also apply on movements between the New York Central and any other Chicago line, where an intermediate carrier is used, but where the New York Central connects directly with another railroad the picture would be the same as reflected by the Indiana Harbor Belt exhibit.

As I have stated earlier in my Testimony, the rail portion of the Rail-Lake Waterborne traffic to be handled at Lake Calumet Port will be, principally, from or to points west and southwest of Chicago, whereas the companion water movement will be to or from or via ports served by Eastern Railroads.

As I see it, the principal road haul traffic in which Eastern Railroads will engage will be that waterborne business, any type, to or from nearby points moving from or to port via rail and water beyond, also strictly rail traffic which may be warehoused at Port Warehouses with a prior and subsequent rail haul, and Grain moving outbound from the Port Elevators to Eastern points during periods navigation on the Great Lakes and the St. Lawrence Seaway is closed.

Upon the assumption the winter grain shipments out- [fol. 4760] bound from the port Elevators to the East would reflect the volume movement for the Eastern Railroads road haul movements, I have prepared an Exhibit to show what the applicants in these cases would have left for terminal services after assuming trackage and port terminal costs. This Exhibit H-148 is identified as "Exhibit Road Haul Eastern Lines". The results vary due to the difference in the amount of the Terminal allowance and the amount of trackage expense, but in substance shows that, the terminal carrier will either handle this traffic at a deficit or in the main at figures closely approximating the measure of its terminal allowance.

H Exhibit 89, being the lease agreement prepared by the applicants and presented to the Port District, for the use of the tracks of the Port District, calls for the payment of $2.00 per car, loaded or empty, and locomotives handled on the tracks with a maximum payment of 5% on the value of the tracks; in addition lessees would agree to maintain the tracks.

I do not know whether this expense would be included in the $5.00 per car mentioned by Mr. Evans, in his letter of November 6, 1956, Exhibit H-129, but if not these expenses

should be included as expenses to be incurred by the applicants and charged to the terminal allowances and divisions to be received by the applicants.

I am here assuming that at least during the Lake navigation season that Grain traffic will for some time constitute [fol. 4761] the major proportion of the tonnage anticipated at Lake Calumet Ports. Of course, there will be empty car movements in connection with the handling of traffic to and from the Lake Calumet area. I cannot predict the number of empty car movements there will be or the percentage of all movements which will be represented by empty car movements; however, if the movement of loaded and empty cars in connection with the Grain traffic for a period of three months, and the movement of loaded and empty cars in connection with the other industries located in the Lake Calumet area for a period of eight months is any criterion, it is clear that the movement of empty cars in relationship to the movement of loaded cars will be very substantial.

My next Exhibit is Exhibit No. H-149, entitled, "Movement of Loaded cars to and from Lake Calumet Industries". The grain movement covers the period of June, July and August, 1957, the beginning period of the operation of the grain elevators. The movement for all commodities covers the period January to August, 1957, or the first eight months of this year.

I call attention to the fact that there were 3053 loaded grain cars in and 516 loaded grain cars out, or a total of 3569 cars. There were available empties on account of the grain movement of 2537. Stated in another way, there was one empty car for every 1.4 loaded cars. I also call attention to the fact that as to all commodities, 5951 loaded cars [fol. 4762] moved in and 2414 loaded cars moved out, or a total of 8365 (Within this total were 1242 cross-town cars, 24 of which were grain). There were available empties on account of all traffic of 3537 or one empty car for every 2.4 loaded cars. Unless and until there is a loaded movement balance there will be a surplus of empty cars at the Port and the terminal revenue of applicants upon a load

handled will be obliged to bear not only the trackage and port costs assessed, in connection with that load but upon the empty car handling the load as well, so it appears upon a preponderance of the traffic the applicants as Terminal Carriers will be handling the business at deficits or at figures closely approximating their Terminal Carrier revenues.

The applicants have stressed large public benefits in the form of lower freight charges upon Chicago District crosstown movements in the event their efforts to directly reach Lake Calumet Port facilities and industries succeed. This assertion is based upon a reduction in the number of lines engaged in the crosstown movement; (a) where today a two-line rate (an applicant and the Rock Island) applies, the result being a one line rate between the applicant's industries and Lake Calumet Port industries—with basically a lower freight charge of $6.00 per car, and (b) where today a three line rate applies between industries upon a railroad, (reached by the Rock Island only via an intermedia to carrier), and Lake Calumet Port industries, and [fol. 4763] for which movement a two line rate would result by reason of applicant directly serving Lake Calumet industries—with basically a lower freight charge of $6.00 per car.

Agreeing that the freight charges for a one line or a two line movement would be less than for two line or three line movements, respectively, the significance of the assertion lies in the volume of traffic involved. As a test I have analyzed the traffic, which moved cross-town between, on the one hand Rock Island Lake Calumet Port Industries and Industries served by other Chicago Railroads, on the other, during the year 1956. This analysis is covered by my Exhibit H-150 identified, "Cross-town-Rock Island-other line industries". The information is segregated as between waterborne and other traffic, inbound to the Port industries and outbound from the port industries, by Railroads participating, by cars handled, the freight charges collected and the amount which freight charges would have

been reduced had the applicants, during the year 1956, directly served Lake Calumet Port Industries.

A review of the Summary Sheets shows that of the 394 carloads moving into the Port, 142 cars were "waterborne" out and 252 cars "other than waterborne" out; that freight charges would have been reduced, $531.00; further that of the 652 carloads moving outbound from the port, 636 cars were "waterborne" in and 16 cars "other than waterborne" in and that the total reduction in freight charges [fol. 4764] would have been $2523.00. The greatest portion of this reduction or $2094.00 would have applied to 352 cars of Steel received at the port from a manufacturer destined to a construction contractor in the Chicago District.

In total, the inbound and outbound movement during 1956 consisted of 1046 carloads upon which the total reduction in freight charges would have been $3054.00, of this amount, $2658.00 would have been upon waterborne traffic.

Everything points to the continual growth of Chicago as an inland port and the location of Lake Calumet holds promise of growth in tonnage handled. Time alone will tell what the volume will be and what the traffic will consist of.

The location of large elevator storage capacity at the Port indicates that grain traffic will represent a substantial proportion of the expected increase.

The effect upon Rock Island revenue of other lines invading our Port territory cannot be definitely fixed, but there can be no question that any invasion would result in a diversion of traffic from and consequent loss of revenue by the Rock Island. The extent of the loss would depend upon the volume of Port traffic handled from year to year and as the volume increases the amount susceptible to loss would be correspondingly increased. The only yardstick presently available from which an estimate of loss in revenue by the Rock Island can be calculated must [fol. 4765] be based upon past periods of operation.

As to commodities other than grain, I have analyzed the 1955 traffic handled by the Rock Island and revenue derived therefrom and believe and revenue earned during the

test period fairly reflects the minimum amount susceptible to loss by the railroad, 1955 business was considered more representative than business handled during year of 1956 which included movement of construction material for the enlargement of the port and which material would be largely nonrecurring.

From this analysis I have prepared an Exhibit H-151 of freight traffic handled and revenue received by the Rock Island on Traffic to or from the Calumet Harbor Port. The first page serves also as a summary. The exhibit is segregated into three sections, as described below, each showing the commodity, number of cars handled, the origin and destinations, the Chicago lines participating in the haul and the Rock Island revenue.

SECTION A—Covers the Traffic handled by the Rock Island in road haul service; further segregated to show;

(1) Local Forwarded

(2) Local Received

(3) Interline Forwarded

(4) Interline Received

[fol. 4766]

SECTION B—Covers the Traffic handled by lines other than the Rock Island in road haul service and upon which the Rock Island performed terminal service at the port.

This section is further sub-divided to show:

(1) Outbound traffic from the port.

(2) Inbound traffic to the port.

SECTION C—Covers the joint cross-town freight traffic handled between Chicago Switching District Industries on lines other than the Rock Island and Lake Calumet Port Industries on the Rock Island. This section is also sub-divided to show:

The foregoing makes no provisions for an increase in general traffic or for more than one turnover of the two elevators annually, so the above figure of $345,964. represents the minimum upon all traffic susceptible to loss by the Rock Island annually.

Believing that future tonnage, all types, will increase greatly as time progresses, and to estimate the possible annual revenue stake of the Rock Island susceptible to loss, annually, I have prepared the following tabulation which shows data calculated upon an upward trend of traffic. The trend on general traffic has been made percentagewise, that is to say, should the increase in such traffic in future years be increased 100%, the susceptible revenue loss to the Rock Island would be twice the 1955 figures; if the volume of such tonnage increased 200%, the susceptible revenue loss would be three times the 1955 loss and so on.

[fol. 4770] My contacts with the two elevator operators—Dan'l F. Rice Co. and Illinois Grain Terminal Company indicate that each elevator should operate with at least two turnovers annually or for both equivalent to 26,000,000 bushels. The following tabulation as to Grain provides for two or more elevator turnovers. The computation for the both types of traffic under this method shows what the susceptible loss of revenue would be—to wit—

Traffic except Grain Increase over 1955 Traffic	*Cars*	*Revenue*	*Grain Increase in Turnovers Over One*	*Grain Cars*	*Grain Revenue*	*Total Cars*	*Total Revenue*
100%	5604	$415,252	1	7138	$276,676	12742	$ 691,928
200%	8406	622,878	2	10707	415,014	19113	1,037,892
300%	11208	830,504	3	14276	553,352	25484	1,383,856

As I have previously stated the effect upon Rock Island revenue by other lines invading our port territory cannot be definitely fixed. The extent of the loss would depend upon the volume of traffic handled from year to year. As the volume moving via rail increases the amount of revenue susceptible to loss would be correspondingly increased. Conversely, as the volume moving via rail decreases the amount revenue susceptible to loss would correspondingly decrease.

[fol. 4771] Any traffic acquired by applicants if granted a certificate would result in a corresponding revenue loss to the Rock Island or the consequent dividing of revenues.

Exhibit H-153 is reprinted from "The Marketing and Transportation Situation," and H-154 is a copy of the minutes of the Directors Meeting of the Belt Railway Company of Chicago on November 11, 1947.

* * * * * * *

[fol. 4844] October 11, 1957

* * * * * * *

William H. Davies was sworn and testified as follows:

[fol. 4845] Direct Testimony

The Witness: My name is William H. Davies, with business address at 707 East 111th Street, Chicago, Illinois. I am employed as Assistant Agent, Operating Department, Chicago Division, for the Chicago, Rock Island and Pacific Railroad Company. In this capacity, I am responsible for maintaining records dealing with the interchange of cars between the Rock Island and other railroads and demurrage.

Mr. C. E. Larsen, Assistant Freight Traffic Manager, Chicago, Burlington and Quincy Railroad Company, testified in this proceeding as follows:

In order to be in a position to know better what the Burlington interest is in Belt entry into the Harbor, we kept a record of the movements of grain by Burlington into

Chicago and the time consumed after they had been de-
[fol. 4846] livered by the Belt to the Rock Island until they were set by the Rock Island, the switching carrier, at the Port. We have found that the time elapsed from delivery by the Belt until the cars were set by the Rock Island was almost always 3 or 4 days, although in a few instances they were set within 2 days. In contrast, Mr. Poole has testified, on behalf of the Belt Railway of Chicago, that cars delivered to the Belt on one day will be set at the Port area the following day. From the standpoint of the shippers served by the Burlington, this is a tremendous advantage. It means that, based on the study of our actual movements of cars in July and August, we can reasonably expect that cars will be placed at the Port 2 or 3 days sooner than they can otherwise be if the Belt application is not granted. This difference of 2 or 3 days might in many cases mean the difference as to whether a shipper dependent on the Burlington could or could not compete for business to the Port area.

A request was made by Mr. Dwinell in this proceeding that Mr. Cubbage furnish the Rock Island with the working papers used by him upon the basis of which the above statement was made. Mr. Cubbage supplied the Rock Island with a record of Burlington road haul grain going to the Lake Calumet Port elevators via the Belt Railway of Chicago and the Rock Island between July 15 and August 15, 1957. With the information supplied to the Rock Island [fol. 4847] by the Burlington, I made a study of the interchange records in my office to determine when the Burlington road haul cars were turned over to the Rock Island by the Belt for delivery to the two elevators at Lake Calumet and to determine when the cars received from the Belt were placed at the elevators for unloading.

Exhibit H-155 was prepared by me and is true and correct to the best of my knowledge. The exhibit was prepared from Rock Island's interchange and demurrage records. The exhibit shows that Mr. Larsen's statement concerning delay in placing cars is incorrect. My exhibit

shows that 78 of the 98 cars listed in Mr. Larsen's work papers incurred no delays by the Rock Island as they were placed on the unloading tracks of the elevators by the Rock Island on the same day or the day following receipt, or, if received on Saturday or Sunday, were placed for unloading on Monday. As for the twenty cars in which delays were incurred, twelve were delayed only one day, and these delays were due to the fact that the elevators could not handle the cars because of earlier arrivals. One of the remaining eight cars in which delays were incurred was delayed two days, and seven cars were delayed three days. The delays of these eight cars were brought about by other cars arriving after the eight had arrived and being placed for unloading ahead of the eight.

It is to be understood that all 98 cars, including the eight cars shown in the exhibit, were placed in the Port [fol. 4848] Yard adjacent to the elevators on the same day or the day following receipt from the Belt Railway Company of Chicago and the delay of the eight cars was between the Port Yard and the elevator tracks.

* * * * * * *

MARVIN L. FAIR was sworn and testified as follows:

* * * * * * *

DIRECT TESTIMONY

The Witness: My name is Marvin L. Fair. I am a transportation consultant, Professor of Economics and Trans- [fol. 4849] portation at Tulane University and Director of the Tulane Institute on Foreign Transportation and Port Operations.

As a transportation economist, I have given particular attention to port problems, including those of both railroads and vessels, for the past 25 years. Publications resulting from my study and experience include "Economics of Transportation," a general book on transportation by Fair and Williams published in 1950 and used

among American universities and colleges and in some foreign countries as a basic reference in transportation; and a book entitled "Port Administration in the United States," written in cooperation with the American Association of Port Authorities and published in 1954. Between 1937 and 1939 I served as Research Director of the Great Lakes and Inland Waters Survey of the Federal Communications Commission. During the period of World War II, I was Chief consultant to the Division of Transportation of the War Production Board. Immediately following the War, I served for two years as Chief of the Port Development Section of the United States Maritime Commission.

In recent years I have served in a consulting capacity for, among others, the Organization for European Economic Cooperation, Headquarters in Paris, Department of Commerce, the Brookings Institution, and the Ports of [fol. 4850] Duluth and New Orleans.

I have for many years had a lively interest in the Great Lakes and its transportation possibilities. I have read reports that have been prepared on the plans for the development of the harbor and the development of its potential traffic. The Lake Calumet Port has a promising future because of a good plan, room for development, a territory from which to draw, and availability of bulk cargo. The present facilities have been constructed according to high standards. I think I could say very high standards.

Notwithstanding the fact that I think that the Lake Calumet Harbor has a promising future, I do not see how I or anyone can make an accurate estimate of the export and import traffic which will move in and out of the port. For reasons I will set forth later, it is simply impossible to estimate with any degree of accuracy the seaway traffic as a whole, the Chicago Port traffic as a whole, or that of Lake Calumet. This is reflected by the fact that the estimates of traffic which have been made by various sources vary as greatly as they do.

Since the St. Lawrence Seaway became a probability, there have been a number of forecasts of the traffic which might be expected to go through the Seaway. Among others, recent forecasts have been made by the following agencies and individuals:

James C. Buckley, Inc.
[fol. 4851] The Canadian Dept. of Trade and Commerce, 1955
The St. Lawrence Seaway Corp., 1956
U. S. Dept. of Agriculture, Agricultural and Marketing Service, 1957, prepared by Sargent Russel.

I have prepared Exhibit H-156, which is true and correct to the best of my knowledge and belief, showing tables of recent estimates of traffic of the St. Lawrence Seaway by the above sources.

These forecasts vary widely with respect to the total amount of traffic which may be expected to go through the Seaway during the first year of its operation, 1959, but vary even more in the estimate of the ultimate traffic which may be expected by 1965 or 1967. Most of the estimates are for the latter period. There are two estimates for the year 1959; that of James C. Buckley, Inc. of 30,000,000 tons and that of the St. Lawrence Seaway Corp. of 36,500,000 tons. The 1965-1967 estimates vary from 31,000,000 tons to 52,000,000 tons.

An analysis of the Department of Agriculture was published in the July, 1957 survey of the *Marketing and Transportation Situation*. This is the most recently published analysis which attempts to evaluate the transportation significance of the St. Lawrence Seaway Canal and it gives a more conservative forecast. After surveying the limitation of the depth of the channel, the limited capacity of the Welland Canal, and after questioning the cost advantages which have been claimed for overseas and ocean coastwise movements, it concludes that while it will be an [fol. 4852] important transportation artery for continental

movements of iron ore, coal, petroleum and grain, it will not cause radical changes in existing channels of trade for agricultural products from the United States and will remain primarily in inland waterway (pp. 22 and 41).

Mr. Chartrand: Might I object to all this testimony on what this man's opinion is on this testimony put out by Sargent Russel? It seems to me there is some other manner of illustrating this document.

Exam. Albus: Very well; you may object to it, but the objection is overruled. Continue please.

The Witness: There are also wide differences in the estimates on three categories of traffic which have been emphasized in all analyses of future traffic; namely, iron ore, grain and general cargo. The estimates of iron vary from 20,000,000 to 37,500,000 tons. Grain varies from 4,740,000 to 10,000,000 tons. General cargo varies from 1,800,000 to 6,000,000 tons.

The forecasts agree in respect to the categories of traffic which will make up the major part of the total. These categories are iron ore, grain, petroleum and coal. The tables do not reveal fully the conviction shared by some that coal and grain for Canadian destination and the westbound movements of iron ore will utilize a very large percent, if not the total capacity of the Seaway, which will be limited by the capacity of the Welland Canal. This conviction is based not only on present traffic, but also on the [fol. 4853] present trends of traffic independent of the Seaway. It follows that an overwhelming percentage of the trade going through the Seaway will be between Lake Erie ports and the open sea and a relatively small percentage will involve the upper lakes.

To arrive at an approximation of the export and import traffic which will move in and out of Lake Calumet port, being its share of the total import and export traffic moving through the St. Lawrence, it would be necessary first to determine at least approximately the total traffic which may move through the St. Lawrence Waterway. There are a number of factors to be considered which will determine the

amount of traffic. They, among others, include the following:

(1) The length of the navigation season, which is estimated to be seven or eight months, due to freeze-ups during the winter months.

(2) The physical conditions of navigation which restrict operations and make for hazards of navigation and delays. The distance between Chicago and tidewater on the St. Lawrence River at Montreal is about 1260 miles and from Montreal to the ocean, a distance of about 1,000 miles. There is a difference in elevation of about 557 feet between the average level of Lake Michigan at Chicago, and the level of the head of the tidewater. The Welland Canal, 27 miles in length, overcomes a difference in level of about 327 feet between Lake Erie and Lake Ontario by means of a [fol. 4854] series of locks; and 46 miles of canals and a series of locks overcome a difference in elevation of about 230 feet in the upper St. Lawrence River area. Thus, in operating between Chicago and Montreal, a vessel must traverse connecting channels between the Great Lakes, canals, and narrow channels where restrictions of necessity exist. While eventually a 27-foot depth will prevail, it is expected that for at least five years the channel west of Lake Erie will have a controlling depth of 21 feet; the present depth. This depth is entirely inadequate for the standard ocean-going vessel. Even when the 27-foot channel is available, the barges and more efficient standard ocean freight vessels will not be able to traverse the waterway under full load. It should be pointed out that the minimum channel depth at major ocean ports in this country is maintained at 35 feet, and plans have been made for increasing this minimum to 40 feet at a number of these ports to accommodate the greater draft of ocean-going vessels. Furthermore, there are 239.6 miles of restricted channels in the whole seaway route from Chicago. Of these 115.6 miles are in the Great Lakes area and 124 miles in the St. Lawrence itself. Navigation in any part of the 239.6 miles

can be quickly paralyzed by an occasional dense fog, providing a constant danger of collision and stranding. Very slow speeds are dictated for these restricted channels, some as low as 6 miles per hour, even when weather is favorable. Hazards and delays increase costs of operations.

[fol. 4855] (3) The effect of the tolls upon the volume of traffic may prove to be substantial. The uncertainty of traffic volume arising from the legal requirement of self-liquidating tolls is reflected in the testimony of Dr. N. R. Danielian, President, Great Lakes—St. Lawrence Association and Chairman, Chairman Users Committee on St. Lawrence Seaway Tolls, who has been identified as a leading, if not the leading proponent of the Seaway, before the House Public Works Subcommittee on Rivers and Harbors on April 10, 1957 when he remarked: "The economic issue is that due to the existence of the many competing routes available into and out of the Middle West, it may not be possible to charge toll rates high enough and, at the same time, retain a volume of traffic, which will bring in revenues annually beginning in 1959, in an amount variously estimated at from $23 to $28 million a year." The administration of the St. Lawrence Seaway Corporation at recent informal hearings on Seaway tolls gave unequivocal assurance that the Corporation would seek to charge self-liquidating tolls as the present law requires.

(4) The capacity of the Welland Canal will limit the capacity of the Seaway. Estimates of the practical capacity of this set of locks varies widely with some varying from 30 to 44 million tons a year.

(5) The Welland Canal in 1956 handled over 23,000,000 tons of cargo, increasing at the rate of 3,000,000 tons a year. [fol. 4856] Of the total tonnage, coal moving principally from Lake Erie ports to ports on Lake Ontario and the St. Lawrence accounts for over 5,600,000 tons, and iron ore accounts for over 5,200,000 tons. The present lake traffic and anticipated westbound ore traffic which is estimated to

ultimately reach 19,000,000 tons, will utilize most of the available capacity of the locks. Possible military requirements may further reduce the capacity available for western lake traffic. Intensive use of the Welland Canal, exclusive of overseas trade, is indicated and greatly extending present occasions for congestion and delays.

(6) As far as ocean freighter service is concerned, the ability of a port to attract traffic depends largely upon the potentialities of a two-way movement which is suitable for carriage in line vessels. If the more sanguine estimates incorporate this factor, it has escaped me.

(7) The severity of competition existing between the ports of the Great Lakes and ocean ports for traffic moving to and from overseas will result in these ports doing all they can to hold the traffic.

(8) For similar reasons the steamship lines serving these ocean ports and long-established in world trade will do all they can to preserve the present channels of exports and imports including opposition to conference rates which would equalize Great Lakes ports with seaports.

(9) A very competitive situation exists between water [fol. 4857] carriers operating on the St. Lawrence Waterway on the one hand and other modes of transportation operating between mid-America and ocean ports on the other. These carriers may be expected to do all they can to protect their traffic.

(10) Efficiency of operation of Great Lakes ports, including speed of inspection and clearance by Customs Public Health and the Department of Agriculture and availability of berth space and experienced labor at the ports. Vessels traversing the St. Lawrence Seaway route and from Chicago undoubtedly will make several intermediate port calls. The variables of operations at the several ports will affect the operating schedules and therefore the total voyage time of the vessels as much as the physical conditions of navigation, mechanical failures and acts of God.

(11) Only time will determine the ability of the Great Lakes ports to overcome the established pattern of movement of exports and imports already established to and from ocean ports. Many facilities and services will be involved, including labor, marine supplies, and adequate commercial arrangements. This problem is recognized also by Mr. Danielian. In his testimony of a year ago before a Senate Subcommittee of the Foreign Relation Committee, he stated:

> "And I think there is a considerable problem there because, as you know, many Middle Western corporations have their export departments on the east coast, [fol. 4858] and to change that presently established scheme of distribution for these corporations is a major operation, because their establishments on the east coast do not merely consist of expediters and forwarders, but they consist of packaging plants and assembly plants, and so on, and in many cases, they have millions of dollars worth of investment.
>
> "For them to consider the use of the Great Lakes as a means of shipment direct to offshore points will require a very serious re-examination of their internal logistics of distribution. They will not be able to do that economically unless they secure at least two advantages which will have to be developed after 1959, one being service, by which I mean service to all parts of the world. It is not enough to have shipping services only to northern Europe; service to all parts of the world must be available to these people, so that a larger percentage of their total export-import business can be handled out of the Great Lakes . . . " (Hearings before a subcommittee of the Committee on Foreign Relations, United States Senate Eighty-fourth Congress, Second Session on the Great Lakes Basin, p. 76).

(12) Perhaps the most important factor will be the high cost of vessel operation through the St. Lawrence Water-

[fol. 4859] ways compared to transportation to and from ocean ports. The difference in the size of the vessel for efficient operation on the ocean and that which will become standard on the Great Lakes is a major cause for the disadvantage in cost. The greater efficiency of the ocean-going vessel of 10,000 tons over the prospective lake-ocean vessel of 8,000 tons is a very substantial one. Indeed, it is doubtful that American flag vessels, even with the aid of subsidy, will find it possible to operate profitably on the Great Lakes seaway route. Besides the difference in the direct operating cost, there is the matter of investment on the vessel that costs from $1 to $6 million during the four or five months they cannot operate on the seaway route. Finally, there is a possible difference in marine insurance costs because of the greater hazards of navigation.

(13) Political, military and economic conditions at home and abroad. This can be most important.

Added to the uncertainty of the seaway traffic as a whole is that relating to the volume that is likely to move to and from the Chicago area. In arriving at an approximation, consideration would have to be given to the division of traffic between and among the ports of Chicago, Milwaukee, Duluth, Detroit, Toledo, and other ports similarly situated. Among the factors which will affect the volume of traffic moving to and from the Chicago area are the added costs of transportation and the additional sailing time involved. [fol. 4860] The rail distance between Chicago and Toledo is 250 miles compared to some 544 miles by lake and two days added sailing time. For this reason it is conceivable that steamship lines will prefer to pick up their mid-continent traffic at Toledo.

The recently established steamship conferences in the lakes have placed the U. S. ports of the Great Lakes into three groups ratewise, Buffalo-Cleveland area, Detroit-Toledo area, and Chicago-Duluth area, respectively, the rates in general to be higher for the western ports.

The rates, Chicago and Duluth will be 2.5¢ per cubic foot, or 5¢ per hundred pound weight cargo, which is $1.00 per

ton above the Detroit-Toledo rate, which in turn would be the same level above the Cleveland-Buffalo rate.

In addition to the uncertainty of the Seaway traffic as a whole and the Chicago area traffic is that relating to the volume that will move to and from Lake Calumet Port. Chicago is a very large port of many segments of which Lake Calumet is only one. It is noted that the U. S. Army Corps of Engineers in "Waterborne Commerce of the United States, Calendar Year 1955, Part 3, Waterways and Harbors, Great Lakes," which is one of a series of five publications containing statistics on waterborne commerce of the United States, includes under the classification "Port of Chicago" the following parts: Chicago Harbor, Chicago River (main and north branch), Chicago River (south branch). Chicago Sanitary and Ship Canal, Calumet-[fol. 4861] Sag Channel, *Lake Calumet,* and Calumet Harbor and River.

What part of the total increase in trade in general cargo and grain Lake Calumet Port will enjoy in competition with other segments of the Port of Chicago is very difficult to determine. The traffic in and out of Lake Calumet Port will be influenced by improvements and developments at other segments of the Port of Chicago, by the number and size of wharves at Lake Calumet, and by the extent to which these leased facilities are used for storage rather than for transit cargo.

A New York engineering firm has recently made some recommendations. This report entitled, "Port of Chicago Development Plan," which was prepared for the City of Chicago by Messrs. Tippets, Abbett, McCarthy, Stratton, Engineers, New York, N. Y., and submitted to the City of Chicago on August 21, 1957, recommends that the City of Chicago construct a port with 13 berths at the mouth of the Chicago River for general cargo. No provision is suggested for bulk cargo. It recommends further that consideration be given to development of Calumet Harbor as a public Port on the lake front. What the future of these plans may be, I do not know.

The public port at the mouth of the Chicago River would be served by the Illinois Central and the Northwestern Railroads, the first serving the facility south of the river and the second serving the facility north of the river. Even if it were physically feasible for other railroads to gain [fol. 4862] some access to these facilities, I would see no reason for their entrance so long as these roads furnish adequate and efficient service for themselves and all connecting railroads.

Another way of estimating Lake Calumet traffic might be used. This would be to estimate the future export and import business of each port and then study the totals, revising the estimates for each port in view of the facts developed as to all ports and applying all the factors which must be considered. The end result would be the estimate of the total traffic moving through the St. Lawrence. But no matter what method of approach or computation of methods is used, no really reliable estimate can be made.

Whatever the movement of traffic in export and import trade that develops into and out of Lake Calumet Port, I cannot see that any appreciable amount of that traffic will move by rail to and from Chicago, and from and to the territory contiguous to the lake cities such as Detroit, Toledo, Cleveland, Erie, and Buffalo since such traffic would be handled at these ports.

As for other than import-export traffic, I am again unable to give any accurate estimates of the volume which will move to and from Lake Calumet Port. No accurate estimate of the volume of domestic traffic moving in and out of Lake Calumet Port can be made when it is not known what facilities will be established there in the future, what land will be leased to industries, and what particular type of industries and the size and number of the industries [fol. 4863] will be located there. It is impossible now to determine the amount of rail traffic which will be generated there.

All I have said about the future of traffic was stated merely to show the impossibility of forecasting of traffic

with any degree of accuracy. Notwithstanding what I have said, Lake Calumet Port, as I said before, has a promising future, because of a good plan, room for development, a territory from which to draw, and presence of bulk commodity traffic, but time alone will tell what volume of traffic will move in and out of the port, and how much of it will move by rail. Grain traffic undoubtedly will represent a substantial portion of the port's business because of the presence of large elevator storage capacity there. What portion of the total volume of this traffic will be moved by railroad to and from the port is difficult to say.

DeLeuw, Cather & Co., an independent consulting engineering firm entrusted by the Port District Board with the economic studies, engineering plans and supervision of construction, in its "Report on Lake Calumet Harbor Development, Chicago Regional Port District," published in July, 1955, anticipates at page 20 that some 9/10 of the cargo to be handled through the transit sheds will be moved by truck and about 2/3 of the total volume of grain will be shipped by rail. The report goes on to state that the improvement of the waterway system will increase the [fol. 4864] grain traffic by water to approximately ½ of the total, leaving ½ to be divided between rail and truck.

For the past 25 years I have been concerned with the problems of railroad service in connection with port operation and administration, and I have some familiarity with railroad operations at the principle seaports of the United States. Needless to say, the problems of port operation and administration must, of necessity, embrace problems of railroad service to, from, and within ports. No one specializing in port operation and administration can disregard rail service to, from, and within ports and the problems that are involved in such service.

It is my considered opinion that the public interest would not be better served by the entrance of the applicants to the Port than by continuation of the switching service provided for Lake Calumet Port by Rock Island. The reasons for this position and which I will discuss briefly are:

(1) The advantage of a single responsible switching service for such a port area is substantial;

(2) The position of the Rock Island Railroad as a terminal railroad and as a western trunk line railroad are complementary, wholly constructive and related to the promotion of the Lake Calumet Port.

(3) The conditions under which the Rock Island was permitted to acquire the facilities of the Pullman Railroad give adequate protection to connecting lines;

[fol. 4865] (4) The Rock Island facilities in the area are strategically located to give adequate service for the present and for the foreseeable future.

The single responsibility in switching service of a waterfront area promotes efficiency. Under the operation that now exists at Lake Calumet Port, where Rock Island has the sole responsibility of switching, congestion is prevented at the waterfront; and overlapping and duplication of service is eliminated, thus reducing transportation costs. Competition in this type of service is most wasteful and detrimental to the public interest in the port area.

Rock Island is complementary to and not competitive with the development of traffic by Lake Calumet Port. Nothing promotes a port development more assuredly than the cooperation of the port with a trunk line that serves the principle area of its hinterland because of its obvious identity of interest in the development of traffic. This mutuality of interests between Lake Calumet Port and Rock Island in the development of traffic is apparent on its face.

The initiative of Rock Island in purchasing Pullman Railroad and its properties is itself evidence of the interest and faith of this railroad in the development of the Calumet area as a port and as a potential industrial area.

The conditions under which the Rock Island was permitted by the Interstate Commerce Commission to acquire [fol. 4866] the facilities of the Pullman Railroad serves to give assurance of nondiscriminatory service and reason-

able switching rates to all trunk line carriers. The obligations imposed upon the Rock Island in this proceeding were as follows:

(1) The present neutrality of handling traffic inbound and outbound by Pullman Railroad Company shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of Pullman Railroad Company without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

(2) The present traffic and operating relationships existing between Pullman Railroad Company and all lines connecting with its tracks shall be continued, including present points of interchange, insofar as such matters are within the control of the applicant, subject to such changes as may be agreed upon by the carriers involved, or as the Commission may order in appropriate proceedings.

(3) The Pullman Railroad Company shall accept, handle, and deliver all cars inbound and outbound loaded and empty, without discrimination in promptness or frequency of service as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

Ref: I.C.C. Finance Docket No. 16252, Pullman Railroad Company Control, etc., Decided November 17, 1949, page 13.

[fol. 4867] The ownership and operation of Pullman Railroad by Rock Island certainly does not prevent carriers in the Chicago Switching District from serving the Lake Calumet Port through normal switching arrangements. In this operation, nondiscriminatory service is mandatory and reasonable rates can be presupposed.

I have made some inspections of the facilities and railroad layout at and near the Port and have read the testimony of Mr. Throckmorton as to plans and of Mr. Gilfillan as to operations. From my investigation, I submit that if the present Port facilities were to be used to capacity, including a rapid turnover of the grain elevators, that the handling of cars to and from the Port facilities by all applicants would represent an intolerable situation. Only a single switching railroad line with adequate yards could cope with such a situation. I understand that Rock Island has the space to build whatever yards would seem to be required to meet realistic traffic needs and would not be handicapped by cramped and inadequate access to the waterfront, nor by the delays which would be incident to movement over the tracks of other railroads. Furthermore, I don't see how the establishment of a many-headed joint switching arrangement, using the same kind of men and locomotives, could improve on the Rock Island operations.

It is my conclusion that so long as adequate interchange arrangements remain in effect and so long as the Rock [fol. 4868] Island is prepared to meet its obligations under the Commission decision in its acquisition of the Pullman Railroad, there is no sound or practical reason for providing a substitute arrangement for the harbor area.

* * * * * * *

[fol. 4872] R. E. JOHNSON was sworn and testified as follows:

Direct examination.

By Mr. Dwinell:

[fol. 4873] Q. You are the Vice-President in Charge of Operations of the Rock Island Railroad?

A. I am.

* * * * * * *

Direct testimony.

The Witness: My name is R. E. Johnson. I am Vice-President in charge of operations of the Chicago, Rock Island and Pacific Railroad Company. My operating experience on the Rock Island extends over a period of twenty years and has been as Trainmaster, Assistant Superintendent, Superintendent, Assistant General Manager, General Manager and Vice-President in Charge of Operations.

My attention has been directed to the proposal of the applicant railroads that if they are granted admission to the Port, the Pennsylvania Railroad, the Illinois Central, the Belt Railway, the Indiana Harbor Belt, New York Central Railroad, and South Shore Railroad would each take its own trains onto the Port tracks and that each railroad would pull its trains from the Port Yard. The proposal would further call, if the applicants are successful, for the Rock Island to take its trains into the Port Yard.

The proposal is further that joint facility crews would [fol. 4874] be established which would classify the cars brought into the yard by the six applicant railroads and, I suppose, the Rock Island, for the various industries located in the Port, would switch the cars to the industries, and would switch the cars from the industries to tracks from which each railroad would pull out the cars belonging to it. With any quantity of business, this would require receiving and delivering tracks for each of the six railroads, or a total of twelve tracks. The Rock Island would also require two tracks. There are ten tracks in the yard. There would be no tracks for switching purposes.

My attention has also been directed to the contention made in this case that if the Rock Island has the only service to and from the Port, competition will be lacking, and because of the lack of incentive of competition, the Rock Island will not render the highest type of service just as the highest type of service would not be rendered if any other railroad were the sale server of the Port. On the

other hand, my understanding is that it is claimed that competition in and of itself will assure better service.

As I view the matter, the actual service within the Port requires engines, employees and supervisors—whether the engines, employees and the supervision are the engines, employees and supervisors of a joint facility or of an individual railroad. I have not been told with whom the joint facility men and supervisors will be expected to compete in order to assure the most efficient service from them. [fol. 4875] It is my opinion that a joint facility engine having nobody with whom to compete would render no better service than would the employees and supervisors of an individual railroad serving the Port. With the joint facility supervisors reporting to the representatives of seven railroads, there would not be the centralization of final authority which would occur if the supervisors were reporting to one railroad.

My overall reaction to the entire proposal of the applicants, namely, each railroad taking its trains unclassified into the District and taking its trains out of the District, the six applicants working over a long, single-track connection with the South Shore and the Illinois Central, and the breaking up of the train, the switching and assembly of the trains by a joint facility with no centralized control, would produce confusion instead of efficiency, and, further, in view of the limited track capacity within the yard, would be practically unworkable.

As soon as the Rock Island overhead bridge over Doty Avenue at 127th Street is completed, the Rock Island will have a strategically located entrance to the Port, the Rock Island cars going directly into the Port Yard. It will form a much better entrance than the entrance proposed to be used by the applicant railroads since their entrance would traverse a considerable distance over busy and congested Port District property before reaching the yard. Our entrance will be adequate to satisfy all requirements within [fol. 4876] the foreseeable future.

When, however, the Port facilities are expanded northward and the tracks of the Port District are extended north to 107th Street, they will then connect with the 107th Street entrance of the Rock Island to the Port District and the Rock Island will then have two entrances to the Port over Doty Avenue—one from the north and one from the south—and will be able to handle cars in and out of the Port in both directions, affording the greatest flexibility of service and creating an ideal situation for Port operation.

In contrast, the applicant railroads, if their application should be granted, would still have their inadequate approach from the southeast corner of the Port property, and with no opportunity on their part to expand their entrance unless the west approach to the 130th Street bridge is rebuilt or to change its location. The larger the port gets, the more inadequate would be the facilities of the applicant railroads.

Direct examination.

By Mr. Dwinell:

Q. Mr. Johnson, you are a member of the Board of Directors of the Belt Railroad?

A. I am.

Q. Were you present at the meeting of the Board of Directors of the Belt Railroad when the proposition was up before the Board on a resolution authorizing the filing of an application with the Interstate Commerce Commission for the Belt Railroad to build its own line of railroad [fol. 4877] into the Port District?

A. I was.

Q. Can you give me the date of that?

A. June 12, 1956.

Q. Do you remember how the Illinois Central voted on that resolution?

A. The Illinois Central voted as opposing the resolution.

Mr. Dwinell: That is all.

Exam. Albus: Cross examine, please, Mr. O'Brien.

Cross examination.

By Mr. O'Brien:

Q. On page 3 of your written testimony, Mr. Johnson, you state that your reaction is that each railroad would be taking its train unclassified into the District, and taking its train out of the District, the 6 applicants working over along, single-track connection with the South Shore and the Illinois Central. Then you proceed to state how you intend to finish the construction of one bridge over Doty Avenue and 130th Street, and perhaps with the expansion of business to construct another track over 107th Street. Are you laboring under the impression that the applicants herein, could not afford double-track connections to the Port?

A. I am not.

Q. You are not under that delusion?

A. In fact, I have said any change would result in reconstruction of the 103rd Street bridge which they propose to come under.

[fol. 4878] Q. Mr. Johnson, what experience have you had in handling, in railroad service into a Port which is served by more than one railroad?

A. I have had none.

Mr. O'Brien: That is all the questions I have.

By Mr. Bierma:

Q. Mr. Johnson, your assumption that the so-called joint facility arrangement would be unworkable is based upon the fact there will be no centralized control of the joint facility?

A. It is based on that plus my experience with joint facilities.

Q. In other words, what has been your experience with joint facilities?

A. I am a Director of the Belt Railway, of the Illinois Terminal Railway, of the Terminal Railroad Association of St. Louis, the Kansas City Terminal, and President of the Waterloo Railroad, which is a joint facility.

Q. And in your opinion, all of those operations are unsatisfactory?

A. I would say that they serve their purpose, but not as adequately as could be done if one individual railroad had the authority.

Q. And your conclusion in the Port Area authority is also based upon the fact there would be limited track capacity within the Port Area?

A. That is correct.

[fol. 4879] Q. Does the Rock Island have any commitment at all from the Port District that it will get a north entrance to the Port?

A. Not a definite commitment other than an understanding. If you understand, at present we do cross Doty Avenue at 107th Street.

Q. But connect?

A. We do not because there is no track up there.

Mr. Bierma: That is all I have.

Exam. Albus: Any further cross examination?

Mr. Chartrand: No questions.

Exam. Albus: Mr. Keating.

By Mr. Keating:

Q. Mr. Johnson, in the last sentence, are you trying to create the inference that the facilities of the applicants are less than those of the Rock Island, or are you confining yourself there to the proposed trackage of the applicants?

A. I have said that there is no way to expand your entrance except by changing the approach or the bridge of 130th Street.

Q. When you talk about facilities there, you are not talking about the applicants' yards and equipment?

A. I am only talking of the entrance into the Port Area.

Mr. Keating: No further questions.

Exam. Albus: Any further cross examination? Is there any redirect?

Mr. Dwinell: None.

Exam. Albus: You are excused, Mr. Johnson. Thank you [fol. 4880] very much.

(Witness excused.)

Will you call your next witness, please?

D. B. JENKS was sworn and testified as follows:

Direct examination.

By Mr. Dwinell:

Q. Will you state your name, please?

A. My name is D. B. Jenks.

Q. Have you prepared a statement to give here?

A. Yes, I have.

Q. Will you give us your address, please?

A. My business address is 139 West VanBuren Street, Chicago, Illinois.

Q. What is your present position and by whom are you employed?

A. I am President of the Chicago, Rock Island and Pacific Railroad Company.

Q. Will you give your background and experience in railroad work?

A. I started railway service as a chairman on the Spokane, Portland and Seattle Railway in 1934. After getting my degree at college, I entered service with the Engineering Department of the Pennsylvania Railroad. In 1938 I joined the Great Northern as a roadmaster. After that I worked as division engineer and then trainmaster on various divisions of the Great Northern. During the war, I spent three years in the Army, two and one-half years overseas with the Military Railway Service in Africa, Italy, [fol. 4881] France, and Germany. In 1947, I was division

superintendent on the Great Northern and at the end of 1948, went to the Chicago & Eastern Illinois Railway as general manager, later becoming vice president. In December 1950, I joined the Rock Island as assistant vice president-operations, becoming vice president-operations in July 1951, and in May 1955, I was made executive vice president. I became a member of the Board of Directors in October 1953.

In April 1955, I became a member of the Executive Committee of the Board and was elected president January 1, 1956, to succeed Mr. J. D. Farrington, who had been president since 1948. At the time of my election Mr. Farrington became, and still is, Chairman of the Board.

Q. Speaking for management, what kind of facilities do you expect to provide Lake Calumet Port?

A. In 1937 Rock Island commenced a program of maintenance and capital improvement to modernize the railroad. This broad program of maintenance and capital improvement is system-wide, including the Chicago District; has continued throughout the years; and is still in effect today. Large sums have been spent for the physical improvement of roadway and in acquisition of and betterment to equipment. Today, because of our program of improvement, enlargement and modernization, the Rock Island is an up-to-date railroad capable of meeting the rail transportation needs of the shipping and receiving public. We have spent [fol. 4882] a considerable amount of money in improving, enlarging and modernizing our facilities in the Lake Calumet area in preparation for handling traffic moving and expected to move to and from that territory. We will continue to make such expenditures as may be required to meet enlarged traffic requirements. We have the resources and will do a good job.

Q. Now, since that statement was prepared, have you prepared another very short statement on the subject of whether simply because the Port District is a public body it should have greater rights to service than private industry?

A. Yes.

Q. Will you go ahead and give us that statement?

A. Statements may have been made here, that merely because the Port District is an organization created by Statute, the facilities and industries in the District should have the services of more than one railroad, and that the wishes of the District to have the services of more than one railroad should be controlling.

I do not agree. We are at the Port. We paid money to get there. We have spent and are spending money to enlarge our facilities to serve the Port.

We will have two entrances to the Port. Our services will be adequate. Warehouses and elevators require the same railroad facilities and operations whether they are located on private property or are located on the Port District property.

[fol. 4883] The claim is made that merely because the industries are located on Port property they are entitled to the service of more railroads. Competitors of the Port District industries have rights, and they have a right to fair competition. Of course, I do not agree that more than one railroad in the Rock Island's territory in question is better than only one. We can do the job better alone.

That it is true that we are the only line serving the west side, but we are a regulated industry. We operate under the Pullman Railroad conditions. We have connections with all railroads. All railroads will serve and reach the Port through the Rock Island. Charges can be changed if they should ever be unfair.

The industry there will get fair treatment. The applicants' proposal appears to be based on a double standard. One for wholly private industries, and one for industries and traffic connected with public property. I do not believe in double standards.

* * * * * * *

[fol. 4893] M. B. PHIPPS was sworn and testified as follows:

Direct examination.

By Mr. Broker:

Q. Will you please state your name, title and address?

A. M. B. Phipps, vice president-operations, Nickel Plate Railroad, 2904 Terminal Power, Cleveland, Ohio.

Q. What is the exact corporate name of the Nickel Plate?

A. New York-Chicago and St. Louis Railroad.

* * * * * * * *

[fol. 4894] By Mr. Broker:

Q. Mr. Phipps, will you describe the Nickel Plate System?

[fol. 4895] A. This Nickel Plate System extends from Chicago east through Argos, Indiana, at which point we have a connection to the north to Michigan City; to the south to Kokomo and Indianapolis, Indiana. Continuing on east from Argos, we pass through Fort Wayne. At Continental, Ohio, the Cloverleaf District of the Nickel Plate Railroad crosses the Nickel Plate District where we enter into Toledo. Continuing on east through Fostoria, Bellevue, Ohio, where we cross the Wheeling District of the Nickel Plate Railroad from which point we have access to Toledo and Northern Michigan and Michigan entirely. Then to the south and east, cities of Massillon, Canton, Wheeling, Stubenville. We also make up through trains at Bellevue, Ohio for movement to Baltimore and Philadelphia by the so-called "Alphabet Route" which consists of the P. & B. V., Western Maryland, and Reading Railroads.

East from Bellevue we pass through Lorraine, Ohio, Cleveland to Buffalo. We have scheduled deliveries and connections at Buffalo which provide continuous movement of cars to the eastern seaboard, New England. These

schedules are comparable or superior to some of our competitors.

To the west we also have gateways at Peoria and St. Louis which are reached either by Argos, Indiana out of Chicago, or out of Toledo or any other point at which we pass through.

Q. Now, this line of railroad that you describe from Chicago to Buffalo, is called the Nickel Plate District of [fol. 4896] the Nickel Plate Railroad?

A. Yes, sir.

Q. And the area here involved in this proceeding is at the western end of that district?

A. Western terminal of the Nickel Plate District, yes, sir.

Q. Turn to page 2 of your Exhibit 158, which consists of a government map of the Lake Calumet area. Will you please describe the Nickel Plate facilities in that area?

A. The Nickel Plate approaches Calumet Lake from the south, touches on the southern end in general, not immediately tied to the land. It continues on north to about 110th Street, at which point it turns to the northwest. Starting about 110th Street, we have a yard of 21-track capacity, 1,909 cars. In this yard all our trains arrive and terminate and are broken up and built up. Likewise, our transfer rolls are made up and depart from this point, and likewise are received and broken up at return from connections.

Q. Is that the area shown generally in a yellowish-green color in a map at the northeast corner of the lake?

A. The property is yellow, that is Nickel Plate property with an extension south of 110th Street, and slightly north of 114th Street, shown in green on the map. That is the Nickel Plate property. It is on the east side of Stony Island Avenue extended. This property exclusive of the area in use with our engine house facilities, our yard classification tracks, coach yard, cleaning tracks, repair tracks, [fol. 4897] and inspection tracks, includes approximately 430 acres of land.

We purchased this land, that is the land exclusive of that which we are now using during the years 1926 or before for a cost of a million and one hundred thousand dollars. We have held that land all this time.

In this general area in yellow, we have room to amply provide two yards of two thousand-car capacity each, and by rearranging some tracks at the southeast end, we could, if necessary, if the development warranted, install additional 800-car capacity yards which would an addition of 4,800 cars to what we now have.

Beyond that we have had a yard in the area between 87th Street and 93rd Street, which when we moved to the so-called Calumet Yard, which is the yard north of 110th Street, was taken up. The grade is there and we could, without any difficulty, erect a yard at that point of 1,200 additional cars. In this yard at Calumet I might mention at the time it was built and originally placed in service, the C. & O. Railroad was a tenant of the Nickel Plate and for some little time after it was open we accommodated not only the Nickel Plate business, but also the C. & O. business. The C. & O. moved out of this yard to their own facilities in 1952.

Q. Did you state for the record the capacity of the yard that presently exists at Calumet?

A. 1,909 cars at the existing yard.

[fol. 4898] Q. After these yards have been filled, if needed, how much land would the Nickel Plate have left over?

A. After we had constructed yards of 4,800-car capacity, we would have 300 acres of land left over.

Q. Will you continue with your description of the general area as shown on this page 2 of Exhibit H-158?

A. To the north it is noted that the Nickel Plate property extends along Stony Island Avenue extended for some distance. Incidentally, there are no improvements on Stony Island Avenue, as you probably can well see, since a good part of it is under twelve to fourteen inches of water. So there are no streets you have to cross at that area.

To the west thereof, there is considerable swamp and it is presently being filled by, or being used as a dumping ground. At the southwest corner of the lake there is indicated in color the approaches which the various applicants desire to construct to enter the Port District Yard in the vicinity of Doty Avenue.

The green at the extreme south end is the K. & E. The red is the Illinois Central, and the yellow is the connection of the Pennsylvania which all railroads would use to the Port District tracks. There is also shown in blue the original application of the Belt Railroad, which as I understand it, has since been withdrawn. The New York Central likewise, is shown, but as I understand it, that apparently has also been withdrawn. The New York Central incidentally is shown in red.

[fol. 4899] The proposed new connection of the Rock Island is also shown in red, slightly north and east—I should say south and east, of the proposed Belt connection.

Q. Just to supplement your testimony, a rough layout of the plans of the port are indicated in pencil in the Lake Calumet area; are they not?

A. Yes, sir. In that area, there are on this map, 9 slips indicated, which, to the best of my knowledge only one of them has been constructed and in service.

Q. In view of the proximity of your Nickel Plate Yard to the Lake Calumet area, and the ability, as you state, to expand the yard facilities there, have you anything to say with respect to the character of the service the Nickel Plate could give to the east side of Lake Calumet?

A. The Nickel Plate with its facilities so located adjacent to the Port District with the yard facilities available to take care of all the services that are necessary to give good service, would be ideally situated. In fact, it could not be better situated to give the east side of the lake the best of service.

Q. Would you please explain the interest which the Nickel Plate has and has demonstrated in the development of Lake Calumet?

A. As early as 1953 my predecessor, Mr. J. C. Wallace, who was then vice president of operations, contacted Mr. Cohen in connection with the plans and what was in sight for this general area.

[fol. 4900] At that time, Mr. Cohen advised Mr. Wallace that there were not any complete plans, that we should keep in touch with him, which we did.

On April 12, 1955, Mr. Cohen wrote Mr. White,—

Q. Is that the third page of the exhibit, third and fourth pages of Exhibit H-158?

A. Yes, sir.

Q. Will you continue with the description?

A. Asking for a proposal of what the railroad would do in the general area. This letter was replied to by Mr. Hales, who was then president, on May 18, 1955.

Q. That is page 5 of Exhibit H-158?

A. Yes, sir. At which time Mr. Hales indicated that we were ready and willing and able to cooperate fully with the Rock Island providing rail service to this property.

On May 7, 1956, I again called on Mr. Cohen since it was his request I keep in touch with him from time to time, and when I was in Chicago I frequently did so, and we discussed two things at that time.

Number one, was the rerouting of our trains from about the vicinity of 110th Street to possibly 130th Street over the Western Indiana. This plan or consideration of Mr. Cohen was declined due to competitive reasons.

The other request was for us to consider what we would do about building a track from our yard, over our property, [fol. 4901] south to the Port property and possibly construct the track on Port property at our expense, which would possibly be later taken over by the Port. That is, a track on Port property.

This was simply a discussion; there was no formal understanding about this matter, and we informed Mr. Cohen we would give this due consideration, and what we would like would be a plan of what he had in mind of this area. He advised me there was no plan available at this time

but I should again keep in touch with him so that when the plan was available he would furnish it to us.

On August 21, 1956 I again contacted Mr. Cohen. He advised me the plans were not as yet ready.

Q. Excuse me, sir. This Mr. Cohen you are referring to is the same Maxim Cohen who testified in this case? A. That is right, sir. He is general manager of the Chicago Port Authority. On October 1, 1956 in accompaniment with Mr. Broker, Mr. White, the vice president of Nickel Plate Railroad, we again called on Mr. Cohen and he again stated that he did not have the necessary plans of the property where he was to have this track considered.

On October 17, 1956 I called Mr. Cohen on the telephone and he again advised me that the matter was still under active consideration.

December 18, 1956 I was again advised that the plans were not ready.

[fol. 4902] Exam. Albus: Excuse me. What date was that?

The Witness: December 18, 1956. On March 19, 1957, in company with Mr. White, Mr. Broker, I again called on Mr. Cohen and he told me that at that time he felt sure these plans would be ready in three or four months. Again on June 5, 1957 I called on Mr. Cohen and I again was advised that the plans were not ready but that he would get in touch with me very soon. About October 7, Mr. Cohen advised Mr. Broker he would like to see me.

Q. What year was that?

A. 1957. On October 8, in company with Mr. J. J. Fitzpatrick, assistant vice president of traffic for the Nickel Plate Railroad, we called on Mr. Cohen. He had a plan. He informed me he had gone to the Army Corp of Engineers for authority to dredge about five million yards of dirt from the general area of Slip #2 as shown on this map, both north and south of this slip in the Anchorage Basin and fill the land over to Stony Island Avenue. He desired the Nickel Plate to immediately say what they would

do about plans and so forth, providing for a track from our property to the extreme south of our property, from our yard to the extreme south of our property with the end of our property being adjacent to Slip #8, or slightly north of 114th Street, at which point this track was to cross Stony Island Avenue extended, and then on Port property extend south to possibly the river or at least south of Slip #2. That matter is not determined yet, but we are [fol. 4903] accordingly having the engineering studies made to obtain estimates and so forth, looking forward to progressing with this improvement.

Q. Now, you have related your relationship and discussions with the Port District. Will you please turn to page 6 of your Exhibit H-158 and describe that document? It is a letter dated May 14, 1957.

A. This is a letter to Mr. Ira J. Bach, Commissioner of City Planning, Department of City Planning, City of Chicago, from Mr. Hales. This letter resulted from the interim report published by the Commissioner of City Planning of the City of Chicago, and in this report which was dated December, 1956, reference was made to rail service on the east side of Lake Calumet.

Item 6 thereunder stated: "The density of the existing rail network in the Calumet Area necessitates careful study for the possible new alignment and/or consolidation. For example, a rail line giving access to the eastern side of Lake Calumet is definitely needed to serve new industries."

Mr. Hales notified Mr. Bach that the New York, Chicago, St. Louis Railroad Company was on the east side and with regard to that were prepared to render whatever railroad service was required in that area.

Q. Mr. Phipps, please turn to the next page, page 7 of your Exhibit H-158. Does that set forth the routes of the interchange followed by the Nickel Plate in connection with other Chicago railroads?

[fol. 4904] A. It sets out the routes of interchange of the Nickel Plate Railroad with other Chicago railroads; yes, sir.

Q. These are the routes that would be employed in effecting interchange of cars which might originate or terminate on the east side of Lake Calumet?

A. Right, sir; correct.

Q. Mr. Pebler, in his testimony, stated that the Pennsylvania connects directly with western railroads, and the Nickel Plate does not. Do you have any comments on that statement?

A. The Nickel Plate Railroad connects, directly connects, with every western line that the Pennsylvania does, with the exception of the Wabash.

Q. And we so interchange traffic?

A. Yes, sir.

Q. Reference has been made by the applicants to car supply. What is the Nickel Plate's position in respect to car supply?

A. The Nickel Plate has an adequate car supply. In fact, we have a reputation not only in Chicago but elsewhere of having adequate car supply, and also being a leader in furnishing special equipment for our customers and shippers.

Q. Do you have any examples of the type of cars?

A. We really were the first ones to develop the so-called "coil car", the basket car and numerous other types of equipment that have become generally in use. In fact, a [fol. 4905] good many railroads used our plan of the coil car. We granted this right to them.

Q. Mr. Phipps, have you heard the plan of the applicants serving the Chicago Regional Port District?

A. Yes, I have.

Q. Will you describe that plan as you understand it?

A. Well, as I understand it, the general access from the several railroads to the south, like the Pennsylvania and Illinois Central, would be through the Wildwood Yard north to Kensington which is in the vicinity of 116th Street, and then over the tracks of the South Shore to connect with the K. & E. to a point about a mile and three-quarters from the Port Yard, at which time the new track would be con-

structed and would extend over to the point where the Port track begins, at which point it would connect with the Port track.

The South Shore apparently contemplates coming in at Hegewisch and move north and west over their own right-of-way to this connection. The Belt Railway of Chicago contemplates entering on to the connection of the IC, which is at 94th Street in the vicinity of the Nickel Plate crossing, at which point they would move to the main line of the Illinois Central in the vicinity of 95th and Cottage Grove Avenue, then proceed south to Kensington, at which point they would follow the same general route as would the Illinois Central with their cars from Wildwood and the Pennsylvania from Dolton, and so forth.

Q. How about the Indiana Harbor Belt?

[fol. 4906] A. The Indiana Harbor Belt has facilities in the area of 115-116th Street and Kensington, and they would come out of the Kensington Yard that is known as the Michigan Yard at Kensington, at which point they too would proceed south and east to the Port on the track that is being constructed.

Q. Now, you described the routes of access. What is their method of operation?

A. All these railroads expect to use this track under the so-called reduced speed rule which is standard operating rule, the standard code. They would proceed in most cases to pull their trains in this general area. The length of time that it would take from this connection with the South Shore track to the Port Yard would depend much on the weather. Reduced speed requires that the man operating the cut, the engine or cars or what have you, be prepared to stop short of an obstruction. So therefore, the visibility would have much to do with the speed at which these cuts would move.

Now, the arrival at the Port Yard, the train would be delivered down to one of the ten tracks at the Port Yard. If it was pulled in, there would have to be a means of getting back from the north end of the yard. The longest track in

this yard is approximately 40 cars. I believe the shortest is around 25 or 28. Cuts longer than the 39 or 40 cars, whatever it is that will fit on this longest track, would, of necessity, have to be doubled over.

[fol. 4907] The engine then would return from the south end of the Port Yard to get in on a track where the outbound cars presumably would be lined up, and pull out when they had an opportunity to do so, or when the track was clear or when they could go.

Q. How many times a day would this operation be performed?

A. According to the information and testimony, I understand it would be 24 trips per day.

Q. That is 12 in and 12 out?

A. Right, sir.

Q. That is 2 per applicant?

A. Yes, sir.

Q. Will you turn to the exhibit introduced in this case which consists of a plan of this track?

I believe it is H-123. You might say that is the plan of the yard on the Port facilities. That would introduce it in evidence by a Rock Island witness.

A. Yes, I have it.

Q. In view of this proposed plan of operation of the applicants, what is your opinion as to the feasibility of this yard for such use?

A. This yard is practically a new yard, and I am quite sure that any operating man that looked at it would certainly say that it was not laid out to receive and build up for departure the cars of six or eight railroads, at the same time, and assemble cars for warehouses and grain to keep elevators going at various levels of unloading or loading, [fol. 4908] and I say that for this reason: On the west side of the yard there are three long tracks which I assume were constructed for the purpose of receiving cuts of cars. Adjacent to these three tracks there are four tracks from which cars can be pulled to or shoved out the furthermost track.

On the north side there are four tracks, one accessible—I should say the east side. There is one track, furthermost to the west is accessible from the west end to the group of tracks on the west side of the yard. There are no cross-overs on the tail track from which an engine could cross over from one track to the other. Therefore, any movement on one side on the north end must be by this one particular track. If it was kept open, naturally it would take up that much space. If an engine desired to cross over from the west portion of the yard to get to any one of the three tracks on the east portion of the yard.

It would further appear that these tracks on that side would be retained to pull empties out from these elevators to keep exchange of loads and empties going as rapidly as it should. Now, it would appear with the Rock Island operating in there and assuming that there are no other than six applicants and the Rock Island to enter this yard, certainly at least half of the tracks or probably seven, depending upon the arrival of these various runs, would have to be retained for these inbound crews to deliver their cars into the Port Yard.

[fol. 4909] Likewise, if there are loads coming in, there must be empties going out, or conversely, so there would be cars to pull from the grain elevators or from the warehouses, whichever the case may be. So therefore, cars would have to be lined up for whichever one of the applicants, or all of the applicants who were pulling in, to tie onto at the south end to pull out. And with this kind of arrangement, it does not seem that they would be, it does not seem to me there would be a great amount of track room left to make a separation of the particular type of grain that would go into the elevators.

My experience with elevator operations of grain is, after grain is inspected they have a certain selection and grain hauled in here promiscuously, that is that which is wanted today and that which is wanted tomorrow and some which is not wanted until the next day or this spot this morning

and the other spot later on, would require separation or classification.

It is not unusual for elevators to say that they will take this group of cars at this time and another group later on. So that there would be separation of the cars going into these elevators required. That is what happens in my experience in feeding cars into elevators.

Q. In view of your description of the proposed operation and your analysis of this yard facility, what is your opinion as to the congestion or lack of congestion in the Chicago Regional Port District under the applicants' proposed plan of operation?

[fol. 4910] A. It is my opinion there would be considerable congestion in this area of six or seven engines, plus another engine attempting to classify cars, plus the fact that as I understand from testimony that the Pennsylvania would have an engine probably move into their own warehouse at the extreme south end near the point where this proposed track will pass under the river bridge, or under the South Shore bridge, and other runs of the Pennsylvania are expected to set off and/or pick up cars from these warehouses on their way into and out of the facility, so that with an hour and a half possibly to be consumed going into this facility, leaving their cars, getting back to the south end, getting onto the cut to be pulled out, getting their air and so forth, that the work, in my opinion the movement could not be programmed so there would not be considerable delay, and certainly some set-back in furnishing the elevators with cars as they required them.

Q. Do you envision difficulty in an overall coordination of service by the six applicants if their application is approved?

A. Yes. I heard the question this morning about this coordination about these runs, and in other words, we are going to get into a split-second timing of moving these runs into the Port area.

I don't believe there is an operating man in Chicago who will say that a cut of cars can start out of a given point,

use somebody else's railroad, cross numerous crossings, [fol. 4911] and so forth, and arrive at the next point at a given time. Specifically, let me set out to you what could possibly happen.

The Pennsylvania intends to run around the Illinois Central tracks just west of the Nickel Plate crossing at 94th Street. This same connection is used by the Illinois Central cuts going from Markham Yard to the Clearing Yard, and in the reverse.

Now, we are going to coordinate these things so this is a single track from 94th Street's Belt tracks to the Illinois Central's tracks in the vicinity of 95th and Burnside.

Now, we have a cut of the Illinois Central coming out of Clearing or Markham, whichever way you want, and we have a Pennsylvania cut released by whoever is running this port, anticipating it as going to take X amount of time for this Pennsylvania cut to get to the Port.

Well, about the time he is ready to enter the Illinois Central tracks, the Illinois Central is headed around, or backing around from their main track up to the Belt crossing. If there is any intervening movement of Nickel Plate trains and so forth, it is not uncommon for those trains to stand there as much as thirty minutes to forty minutes, and by the time the single-track connection from the Illinois Central to the Belt is cleared, the coordinator would be out one hour in his computation.

That is just one example. I could think of probably many more if I sit down and analyze the operation. But, that is [fol. 4912] an outstanding and glaring one, knowing the congestion and the amount of movements around that particular crossing.

Q. Mr. Phipps, you have described the operations the applicant would conduct into the industries that now exist. Do you have any idea as to how they would propose to serve the east side of the lake?

A. Well, let me say that the Lake Calumet Harbor, seems to divide this lake in a half and half affair. His coloring

indicates commercial sites and over on the east side he has indicated industrial sites. So there seems to be a division of what is contemplated by the Port District in the development of this property.

Now, I have no plans. I have not been approached by anyone with plans, but I have seen some of the exhibits that were attached to some of the applicants' applications. One of them was the Belt Railway of Chicago, and they indicated a track from the south side of the river completely surrounding the lake on the Port property; I believe an aerial photograph presented by the New York Central indicated a track extending from the Port Yard around about to, between Slip 6 and 8 or thereabouts.

Now, the distance around there, according to our best computations,—

Q. Just a moment, please. The aerial photograph is Exhibit H-18.

A. That is the one.

Q. I might say to the applicants it is appropriately named [fol. 4913] an extension on here. Go ahead, please.

A. All the discussion and analysis of the delays in movement up to this time have to do with getting only to the Port Yard as it is now located. There has been nothing said about how this movement will continue on north, pass on around the north end of the lake and then proceed south on the east side of this lake adjacent to the property where the Nickel Plate main track is located.

But, I am at somewhat of a loss to understand just how all these railroads, or even this one engine or two engines, whichever might work from this yard, and I understand from Mr. Cohen there is to be no more yard facilities built on Port property, just how a separation for all industries would be made in this yard in addition to what is already there, and how these engines would be controlled moving around this lake onto industries which no doubt over the years, or shortly sometime will be located on the east side of the track.

Q. Did you say what the total distance would be around the lake of such a track if built?

A. 6.1 miles, according to one of the exhibits which the applicant presented.

Q. Just one thing for the record. In measuring track capacity, that is, the number of cars that should be placed on a track, what allowance do you make? How many feet per car?

A. Well, a 50-foot car, that takes all classes of equipment. [fol. 4914] Q. For the record, where is the grain inspection point on the Nickel Plate Railroad?

A. At Calumet Yard, which is the yard immediately adjacent to the Port property.

Q. Do you have any comment on Exhibit H-41 and 42 of the applicants'? I show them to you.

A. Well, it was stated on H-42 that certain Pennsylvania trains from New York would arrive in Dolton Yard at certain times of the day, and on these, on this exhibit they have set up a schedule of arrival at 10:00 a.m. for three of their trains, and at 7:30 p.m. for a train from Louisville, one from Cincinnati and Wolcott. A positive schedule has been set up for use of this track by Pennsylvania trains, which means of course, that the coordinator, whoever he might be, would have to let the other applicants work around these particular times. Also, I might mention that the Pennsylvania now, on this basis, would operate their foreign movements into and out of the Port District in a period of probably nine or ten hours.

The South Shore Railroad witness has testified that the South Shore Railroad would be open for handling of these cars for a period of twenty-four hours. With twenty-four movements, assuming they could be spaced on an equal basis time-wise, it would mean that the heaviest volume will be, assuming that others followed the Pennsylvania program and even though they didn't, would be during the time when the traffic on the South Shore is the greatest, as this [fol. 4915] Exhibit 42 indicates.

Q. I have here Exhibit H-29, Memorandum of Understanding Among the Various Applicants. Now, in response to a question I think from Mr. Chartrand, Mr. Zimmerman testified that that represents the agreement for an ordinary joint facility. I would like your opinion in that respect.

A. Well, I do not quite understand what is meant by the word "ordinary". And secondly, this has all the earmarks of a Belt Line, and I say that for this reason: Here is a piece of property that will be leased. It will have a central group of management people, and they have an understanding where necessary they will jointly purchase,—that they will jointly purchase diesel engines to perform this service. Now, that is unlike the joint facilities that most railroads have where one or the other of the railroads, or perhaps the industry that is going to be jointly served is going to own the property. The property is serviced by an engine that the expense and so on has been predetermined. But, the engine belongs to either one of those that are entering into this agreement, and the land or the tracks and so forth are already there.

Q. Now, contrast that with the proposed method of operation of the Rock Island and the Nickel Plate.

A. The proposed method of the Rock Island and the Nickel Plate are purely an industrial job. Industrial tracks lead off the tracks which they now use and it is simply [fol. 4916] industrial work in every sense of the word.

Q. Just one thing I want to bring out before closing. In your description of your discussion with Mr. Cohen about the construction of a track down from the north, from our yard, was there any discussion of entrance to the lake from any other locality?

A. Mr. Cohen stated that he was very anxious to have plans and know there will be a track there within the year, and whether we wanted to come in from the north or from the south, or both would be acceptable to him.

Mr. Broker: I offer Exhibit H-158 in evidence, and tender the witness for cross examination.

Exam. Albus: Cross examine, please.

Cross examination.

By Mr. O'Brien:

Q. I have just one or two questions. Mr. Phipps, in your description or your understanding what you thought the applicants were going to do in the way of entrance into the Port, you gave the opinion that they would probably have to double over their trains because of the fact that the Port tracks did not stretch out any longer than forty car length. Is that right?

A. Yes, sir; that is right. Provided the cut which they brought into the yard had more than the track would hold.

Q. The same thing would hold true today, as far as the Rock Island is concerned.

[fol. 4917] A. I would say it would, except that if several were bringing in cuts of cars which had to be doubled, the track room would disappear much more rapidly.

Q. Do you have any idea as to how close Kensington Yard of the Michigan Central is located from the Port entrance?

A. Well, it is about 10,000 feet up to the South Shore, and—I have to think a minute. I would say it is someplace in the neighborhood of three miles, three and a half to four miles, something like that. I have not got it right in my mind. I could measure and tell you.

Q. Do you know how far the Wildwood Yard of the Illinois Central is located?

A. Well, I would say it is within a few thousand feet of Kensington. That is just observation. I have not measured it.

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[fol. 4923] JOHN J. FITZPATRICK was sworn and testified [fol. 4924] as follows:

Direct examination.

By Mr. Broker:

Q. Please state your name, position and address.

A. My name is John J. Fitzpatrick. I am assistant vice president, Nickel Plate Railroad, headquarters Cleveland, Ohio.

Q. Please state your transportation experience and qualifications.

A. Prior to 1927, I had several years experience in the Traffic Department of the Baltimore & Ohio Railroad at Baltimore. That included chiefly experience in rate work. During a year and a half or two years of that period, I served as commerce agent and in that position I testified in numerous cases before the ICC and State Commission.

In mid-1927, I was transferred to the Law Department of the Baltimore and Ohio at Baltimore, with a title of attorney. Thereafter I became assistant general attorney, and continued in law work for the Baltimore & Ohio until April of 1941.

In that period I specialized chiefly in traffic work and also in other types of cases before the ICC.

In April of 1941, I was appointed general attorney of the Chesapeake & Ohio, the Nickel Plate, and Pere Marquette Railway, with headquarters at Cleveland, Ohio. While with those roads I suppose about 60 per cent of my time was given to practice before the Interstate and State Commissions, and the balance had to do with other general railroad legal work.

On April 1, 1946, I was appointed chairman of the Traffic [fol. 4925] Executive Association of eastern railroads, with headquarters at New York City. I continued in that position for seven years. In that position I participated in and conducted very many meetings of the traffic executives,

which had to do with traffic matters that interested two or more of the eastern railroads. I conducted all of the meetings for the eastern traffic executives, which brought about the proposals to effect general increases in rates in Ex Partes 162, 166, 168, and 175.

In that period also, I dealt extensively with individual shippers, with groups of shippers, in representing the eastern traffic executives concerning traffic matters. For example, not only for the eastern roads, but for the southern and western roads.

I was the spokesman before the Executive Committee of the National Industrial Traffic League, explaining the proposals that brought about the petition in Ex Parte 166, and 168. The purpose of the meeting and talk with the National Industrial Traffic League, was to have those gentlemen understand the need of the railroads for increased revenues, to understand the basis for the proposal, to solicit suggestions and criticisms, and also to solicit their good will, and to the extent they could give it, support of those proposals before the Commission.

On April 1, 1953, I resigned that position in New York and became assistant vice president-traffic, of the Nickel Plate at Cleveland. At the outset under the traffic vice [fol. 4926] president, I had responsibility for the rates, divisions, and traffic commerce work for the Nickel Plate Railroad. More recently my duties have related chiefly to sales and service, although continuously since being with the Nickel Plate a large part of my time has been given to rate matters.

For example, after the adjournment of the meeting yesterday, I joined our traffic vice president in a meeting here in Chicago at which executives of eastern and western roads are considering a further proposal to the Commission to bring about increases in rates to support the existing facilities and the existing trackage, the existing railroad system.

Q. Mr. Fitzpatrick, you heard the description of the Nickel Plate System by Mr. Phipps. Do you wish to sup-

plement that in any way of general reference to areas served or traffic flows, and mileage?

A. I think Mr. Phipps very well covered that picture. I think I might supply two additional details. The Nickel Plate has extensive mileage in Indiana. Our total road mileage there is 767 miles. We have road mileage in Illinois totalling 314 miles, and, as Mr. Phipps stated, we reach the three important territories between the east and west. That is, Chicago, Peoria and St. Louis.

Q. And what do you have to say about the Nickel Plate's interest in Chicago and in the development of Chicago as a port?

A. The Nickel Plate has an intense interest in Chicago [fol. 4927] and in the development of Chicago as a port. Chicago is a very important terminal territory to the Nickel Plate Railroad. It is shown in many ways. It is illustrated, for example, by reference to the extent to which we maintain direct service with the important western roads direct interchange service with the important western roads mentioned by Mr. Phipps. We are anxious to develop the Port Territory on the east side of Lake Calumet. That is a natural insofar as the Nickel Plate is concerned.

It is immediately adjacent to our own track, and, as Mr. Phipps stated, to our yards in Chicago, which serves as a break-up yard for arriving trains and also for a make-up yard for trains that are dispatched from this area.

Q. What do you have to say as to service routes and rates on the Nickel Plate insofar as they relate to the development of Lake Calumet?

A. Well, we have service routes from this territory with all important connections to the east. An important gateway with the Nickel Plate is Buffalo. Our line goes to Wheeling, and near Wheeling we interchange with the Baltimore & Ohio Terminal Junction, with Pittsburgh and West Virginia at a point very close to Terminal Junction.

It may be suggested that there is some conflict in interest between the Nickel Plate serving Chicago with refer-

ence to import and export traffic to and from the Atlantic Ocean. That is not so. The Seaway is a reality, and we [fol. 4928] look forward to the Seaway as a means of generating tonnage from and to the territory which we serve.

For example, from and to points in Indiana, from and to points in Illinois, and to some extent, from and to Ohio. It may be that as to some traffic we will be short-haul in the sense that possibly some of it might have moved to the Atlantic Coast, affording the Nickel Plate a longer haul. We feel that any disadvantage or any possible loss in that direction will be more than offset by the additional traffic that the development of this port will generate.

It is basic policy with the Nickel Plate Railroad that what is good for the communities we serve will be equally good for us, and that is the way we feel about this port. That is the way we feel about the Seaway, generally.

Q. Now, with reference to the rates, Mr. Fitzpatrick, do you have anything to say in that respect?

A. Well first, I would like to deal with a method of moving traffic to and from this area, and I refer to the east side of Lake Calumet in so far as rates are concerned.

Naturally, we do not have joint rates from and to this area and to and from all points in the United States. Naturally much of the traffic that might come to, or move from the Port on the east side would have origin in the west, or the south or southwest, or the movement might be reversed.

As to such traffic, except for the south, and except to [fol. 4929] some extent in the southwest, we would not have joint rates. The development of this port requires—and when I say this port, I refer to the east side—the development of this port requires service of the Nickel Plate Railroad coupled with a rate arrangement which would enable any railroad reaching Chicago, whether it be a competitor of the Nickel Plate or not, to handle traffic to and from the port under reciprocal switching.

We all know the significance of reciprocal switching. It means the road-haul carrier by rate application extends its

own rates to and from the port the same as if the shipper or consignee were relying alone on rates as filed with the Commission by this carrier.

We will establish and will maintain reasonable switching charges for our switching service, which may be absorbed by all railroads to and from Chicago, thereby giving the railroads, giving the Port the benefit of the complete rate structure of all railroads as filed with the Commission.

As to joint rates, we have dispatch routes, and we have joint rates between Chicago on the one hand and all of the Trunk Line and New England territory. We have joint rates and joint routes to substantially all origins or destinations in central territory east of the Illinois-Indiana state line.

There are some exceptions. For example, there are some situations in which we do not have joint rates via our road into Chicago when the origin is on the lakeshore and [fol. 4930] Michigan Southern Division of the New York Central. Likewise, there would be some situations where we would have joint class rates with connecting railroads where another carrier, a single road-haul between central territory and the port, might have a lower commodity rate. The proposal we submit as to rates would give the shipper or receiver at the port the benefit of these lower rates in every case. And besides, it would have for the shipper the benefit of the competitive service in the fullest measure.

Q. What have you to say about grain traffic in connection with the Chicago Regional Port District territory on the east side of Lake Calumet?

A. Much has been said in this case in regard to grain traffic. I would like to point out first the only two elevators which would handle grain traffic are on the west side of the lake, and would not be served by the Nickel Plate. The only additional elevator proposed for grain, likewise would be located on the west side, and will not be served by the Nickel Plate. This means that all of this special plea addressed by several with reference to grain traffic has no reference whatever to the situation that will exist on the

east side of Lake Calumet. But nevertheless, grain traffic is important to the Nickel Plate Railroad. It is true that the volume which we handle into Chicago from our own origins would not be equal to the volume carried by any important western road into Chicago, nor would it be equal in volume to that of the New York Central or the Pennsyl- [fol. 4931] vania from the east.

As I say, nevertheless we are a very important carrier of grain. We carry a very substantial volume of outbound grain by rail from Chicago and we are among the highest ranking road, single road in terms of grain tonnage, which move into Buffalo which perhaps after Chicago is the most important grain market in the East.

I say that because we live with grain shippers. We live with the grain trade. That traffic is important to us and we will do whatever is necessary so far as our service and our facilities go, to foster and generate that type of traffic.

Q. Mr. Fitzpatrick, page 1 of Mr. Phipps' Exhibit H-158, consists of a map of the Nickel Plate System and it indicates various points along Lake Erie that are reached by the Nickel Plate. What have you to say in respect to the ports served by the Nickel Plate along Lake Erie, and the character of the service, single-line or otherwise, to important industries at those various ports?

A. First, I should say that in large measure the Nickel Plate Line west of Chicago parallels Lake Erie. Pardon me, that is an error on my part. I should say that the Nickel Plate west of Buffalo parallels Lake Erie. Very important lake terminals to the Nickel Plate on Lake Erie includes Cleveland, Huron, and Toledo, Ohio.

In answering your question, I might refer first to the [fol. 4932] situation at Huron, Ohio.

The Nickel Plate Railroad owns its own facilities at that point for delivering cargo coal into vessels and for receiving iron ore from vessels in freight cars. I might add, Huron is reached also by the New York Central. We do not have joint arrangements with the New York Central whereby the Central can reach our coal dock facilities, nor

do we have joint arrangements whereby the New York Central can receive iron ore from our iron ore dock at Huron.

The dock at Huron does handle some other commodities. For example, we are handling currently quartzite, received by a vessel on the dock and shipped by rail. We maintain joint rates with the New York Central on a parity with our own with reference to that port site traffic.

We have also handled a few other commodities from Huron in rail service. I might mention one I recall as molasses, and as to that commodity, the rate level jointly with the New York Central, or if you please, the New York Central,—I have to withdraw that. I'm sorry. The rate level jointly with the New York Central corresponds with the rate level we maintain for a single-line service in the Nickel Plate, or jointly Nickel Plate and some other railroad.

There is a grain elevator at Huron, owned by the Eastern States. I believe it is called Eastern States Milling Company. That elevator is served on the land side by the [fol. 4933] Nickel Plate, and on the water side it can receive grain by vessel. Likewise, it can forward grain or grain products by vessel.

As to traffic to and from that facility, traffic to and from that elevator, the New York Central has benefit of reciprocal switching. There the Nickel Plate would perform the service, and the shipper can deliver the traffic after receiving that service, direct to the New York Central for road-haul service.

I might refer to the situation at Cleveland. At or near the lake front at Cleveland, there are coal dock facilities and iron ore facilities on the Pennsylvania Railroad. In addition, there is an ore dock facility of the Erie Railroad. Those facilities are owned by those respective carriers. Those railroads do not open up those facilities to competing roads reaching Cleveland.

In other words, there is no arrangement by which the Nickel Plate or the New York Central can receive in land-

haul service at Cleveland traffic to or from any of those facilities.

At Cleveland on the river very close to the lake, there is a commercial warehouse enterprise known as National Terminal Dock and Warehouse Company. On the land side it is served by the B & O. On the water side it is immediately adjacent to the river and can load or unload vessels.

As to that facility, there are reciprocal arrangements under which the B & O will switch for any railroad han- [fol. 4934] dling traffic to or from Cleveland. There is a very similar situation at a facility immediately adjourning. It is known as the Cleveland Stevedore Company and is likewise on the riverfront.

That is a commercial warehouse enterprise. It handles foreign freight between the warehouse or the dock and shipper, and I myself have seen ships at that dock loading or unloading foreign traffic.

That facility is also served on the land side by the B & O and every railroad reaching Cleveland under absorption of switching can handle traffic to and from that facility. In other words, the situation is identical with that which we propose with reference to the east side of Lake Calumet.

Another example at Cleveland, the Nicholson-Cleveland Terminal Company is a warehouse and has pier facilities extending directly into the lake. That is served by the New York Central and it is reached by all railroads at Cleveland under the arrangement similar to that I described with reference to the B & O.

There are situations where shippers or receivers at Cleveland have their own storage facilities, and their own dockfront space on the waterfront, and as to which reciprocal switching obtains.

One example, the National Sugar Refining Company has a warehouse served by the Nickel Plate. The dockfront is on the river, and traffic has moved by river to and from [fol. 4935] that property. Any traffic received by rail can move under road-haul by any Cleveland railroad with the Nickel Plate performing reciprocal switching. A similar

situation exists with reference to the plant and dock of the Sherwin Williams Company which is on the riverfront served by the B & O, and likewise has reciprocal switching which makes the plant and the dock available to any railroad handling road-haul traffic to or from Cleveland. Buffalo is another port which is frequently mentioned in connection with the development that will follow the seaway. Already I have stated in general terms that Buffalo is a very important grain center. Buffalo has an elevator grain capacity that runs to 53 runs to 53 million bushels, as compared with 78 million bushels at Chicago.

At Buffalo there is a large elevator known as Canadian Pool Terminal Elevator, which is on the waterfront served by the Lehigh Valley Railroad. It is operated by the grain division of Pillsbury Mills.

That elevator has the benefit of reciprocal switching so that it is available to any railroad serving Buffalo. A similar situation exists with reference to the Central Concrete Elevator, which on the land side is served by the New York Central. This is a commercial terminal for grain, and it is operated by the Continental Grain Company which is a very big dealer in grain traffic. It is on the Buffalo River, and, as I say, is served on the land side by the New York [fol. 4936] Central and it has the benefit of reciprocal switching exactly as we propose for the east side of Lake Calumet.

Still a third example, is the Electric Elevator, so-called, which is on the riverfront, Buffalo River, served on the land side by the Pennsylvania Railroad. It has the benefit of reciprocal switching and for that reason is available to all road-hauling carriers in handling traffic to and from Buffalo.

Another commercial enterprise apart from grain is that of Merchant's Refrigerating Company, which is a large commercial warehouse on the lakefront. It is served by the Lehigh Valley Railroad and it has reciprocal switching so that it is available to all Buffalo Railroads on any traffic in and out of Buffalo.

I should also like to refer briefly to Toledo. In many of these Lake Erie ports are organizations which are out to promote waterborne traffic in connection with the Seaway development. There is one such very active organization in Toledo. It is known as the Toledo-Lucas Court Port Authority. They issue printed matter from time to time.

They have a periodical which is issued every month or two months, showing scheduled foreign ships for trade from Toledo to foreign ports. The issue, referring to August of 1957, showed a schedule for sailings of 18 ships to Europe and Mediterranean ports, and two ships scheduled for South American ports. The corresponding circular for September showed reference to 14 scheduled [fol. 4937] sailings from Toledo to Europe and Mediterranean ports, and I believe only one to South America.

On Exhibit H-107, you will notice the Maumee River extending from the lower left-hand corner of the exhibit in a northeasterly direction, at least toward the center of the exhibit, where the Maumee enters into Lake Michigan. Not far from the bottom of the page, perhaps seven inches, you will notice on the west side, reference to the Great Lakes Terminal Warehouse Company.

This indicates that the facility is reached by the Baltimore and Ohio, and also the New York Central. This is a general commercial warehouse enterprise that handles both domestic and foreign commerce. I am told that while the map indicates the B & O reaches the facility, that actually it relies entirely upon the New York Central service.

This facility as I say, is a commercial warehouse enterprise, handling both domestic and foreign commerce, and has reciprocal switching. It would appear from the map that perhaps it has the benefit of direct water loading. That is not so. When they have foreign commerce to be received, or foreign commerce to be forwarded, it must be moved in a switch movement or by truck.

I emphasize this facility because recently they had on storage a considerable volume of dry powdered milk for the

Department of Agriculture which in the last three or four [fol. 4938] months was shipped abroad. It was moved to a dock immediately across the river known as the Toledo Marine Docks, served by the New York Central. And incidentally, the Toledo Marine Docks consist both of a warehouse enterprise and an open-dock facility. That milk was handled through that facility direct to a foreign ship for forwarding.

The Toledo Marine Dock is especially important in this foreign trade picture because recently at that dock they handled for forwarding abroad not only the milk I referred to, but also power shovels, machinery and parts, and inbound they receive from abroad tulip bulbs and also olives.

Now, we of the Nickel Plate can handle freight to and from that facility under arrangement for reciprocal switching which is on file with the ICC. Continuing up the river some distance on the west side of the river, you will notice the warehouse of the Toledo Harbor Warehouse Corporation. That is served by the Pennsylvania Railroad while the property is located along the river, vessels cannot be loaded to and from that warehouse. The warehouse is engaged in general commerce storage of domestic or foreign freight, or freight of any type except bulk freight, and as to that facility, that particular shipper or consignee, the Toledo Harbor Warehouse Corporation, has the benefit of reciprocal switching.

Farther down the river, just about two inches from the bottom of the page, you will notice reference to A. B. & G. [fol. 4939] Elevator on the east side of the river. That elevator has water facilities. It is located on the B & O on the land side. It is located on the riverfront on the water side. That facility is being operated currently by the Norris Grain Company. That facility has reciprocal switching. Water-borne grain has been handled to and from that facility although I am told recently they are using the facility chiefly for rail traffic. The point is, that elevator has reciprocal switching either on inbound or outbound traffic.

I might mention still another facility at Toledo. This is on the east side of the river. You will notice reference to the National Biscuit Company.

The National Biscuit Company on the land side is served by the Nickel Plate. The National Biscuit Company facilities at that location include a very large elevator, and only recently the Cargyle Grain Company loaded a shipment of grain through that elevator on the waterfront, of course.

Q. Mr. Fitzpatrick, does that complete your description of Toledo?

A. Yes, it does.

Exam. Albus: You are not going through each one of these.

Mr. Broker: No, sir. Just a brief statement.

By Mr. Broker:

Q. I have here Exhibit H-107, Ashtabula Harbor. Do you have any analogy between that and the situation now before the Commission?

[fol. 4940] A. Well, that shows the waterfront facilities of both the New York Central and Pennsylvania Railroad with the river between.

The exhibit shows the extent to which they have built up tracks to serve those respective facilities. The analogy, I think, flows from this.

There is a separation of wager [sic] that corresponds very closely with what we have in this case. Here we have Lake Calumet with one railroad, the Rock Island on one side, and Nickel Plate on the other.

Q. Now Mr. Fitzpatrick, the applicants and their supporting intervenors, have stressed the public character of the facilities, and the activity of the Chicago Regional Port District as a basis for approval of their applications. Do you have any opinion with respect to this matter?

A. I think that serves as no reason for distinguishing the situation here from others to which I gave reference. After all, the railroad is interested in traffic from a

shipper. It does not make any difference to the railroad whether some financing that went into the plant is government money, or if you please, insurance company money, which after all is money of the people themselves.

These are commerce enterprises, and they are used for profit, except to the extent the Government itself is a shipper. And the Government is a shipper through Toledo facilities as I illustrated here, and they are shippers [fol. 4941] through Buffalo and every other port facility. There is no basis for a distinction between facilities as to which financing can be traced originally to a Government enterprise, and other facilities, when it comes to railroad service and railroad rates.

Q. Do you have any opinion as to whether or not there would be a duplication of railroad facilities if these applications were approved?

A. Yes, I do. I think that this is just an enterprise adjacent to the Rock Island Railroad and they ought to be permitted to serve it and develop it. I feel the identical way with reference to our side of the lake. And after all, we are not talking about some machine or something that is going to generate something that is brand new to the railroad industry. We heard a witness here for the Department of Agriculture say that the business that moves through Chicago will be diverted from another port. This is the same business, but it is just going to go to another facility and the railroad already there ought to be permitted to develop and handle it.

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[fol. 4944] JAMES A. JAKUBEC was sworn and testified as follows:

Direct examination.

By Mr. Keating:

Q. Will you state your name, please?

A. James A. Jakubec.

Q. What is your address?

A. Room 211, Union Station, Milwaukee, Wisconsin.

Q. Are you employed by the Chicago Milwaukee St. Paul & Pennsylvania [sic] Railroad?

A. I am.

Q. In what capacity?

A. General superintendent.

Q. With headquarters where?

A. Milwaukee, Wisconsin.

Q. How long have you been at Milwaukee?

A. I was at Milwaukee as general superintendent from May 1, 1953 until March, 1955, and again since February 1 of this year.

Q. Are you familiar with the Port of Milwaukee and railroad facilities in there?

A. Yes, I am.

Q. You have before you what has been previously [fol. 4945] marked as Exhibit H-103, for identification. Does that show the railroad facilities at the Milwaukee Port at the present time?

A. Yes, it does. I notice, however, it shows the trackage at the Grand Trunk Western Terminal as being Northwestern trackage, which I believe is incorrect. That is property that is owned by the Grand Trunk Western, and it is served both by the Northwestern and the Milwaukee Road.

Q. That is just west of what is designated as Jones' Island?

A. That is right.

Q. And the Grand Trunk is not indicated on that exhibit is it, in color?

A. No, it is not.

Q. This particular area here, what is that known as?

A. That is known as Jones' Island.

Q. Do you know by whom that is owned?

A. That is owned by the City of Milwaukee. It is under the jurisdiction of the Port of the Harbor Commissioner.

Q. By whom is it served?

A. Served by the Milwaukee, our line, also by the Northwestern and the Chesapeake and Ohio also has access to it for their ferry operations.

Q. Is the line of the Chesapeake and Ohio indicated in color on that particular exhibit?

A. No, it is not. The most westerly yard here, I believe the legend shows that is jointly used by the Milwaukee and [fol. 4946] the Northwestern. Actually, it is leased by the Chesapeake and Ohio and the operations in that yard are performed by the Chicago and Northwestern Railroad under an operating agreement with the Chesapeake and Ohio.

Q. Now, north of Jones' Island and west of Jones' Island, the green track is desigated to be that of the Northwestern.

A. Yes, that is exclusively Northwestern.

Q. Is that privately owned property on which those facilities are located as opposed to public?

A. As far as I know.

Q. And over further west, the large reddish trackage is indicated to be that of the Milwaukee.

A. That is exclusively Milwaukee trackage.

Q. That was developed by whom?

A. By the Milwaukee Road.

Q. And the Milwaukee Road, does it own some of the property in that area?

A. Some of the property is owned by us and a very considerable portion is leased out to industries.

Q. Is there any public body owning property in there?

A. Not to my knowledge.

Q. So then the public area of that harbor is served jointly by the Milwaukee and Northwestern, and also to an extent by the Chesapeake and Ohio.

A. That is correct. As a matter of fact, at the present [fol. 4947] time, the Harbor Commission is concluding negotiations with the Chesapeake and Ohio to permit them to place their old locomotives, and employees on the Island to handle their own cars and serve the industries.

Q. Who served Jones' Island originally?

A. Well, originally I believe the Illinois Steel Company was located in an area there and was served by the Milwaukee and the Northwestern.

Q. And did the Northwestern then extend up further north on Jones' Island before the Milwaukee?

A. Well, the trackage on the Island is owned by the City.

Q. Was your railroad requested by the city to serve the public property?

A. Yes, we were.

Q. Were you opposed by the Northwestern?

A. Yes, there was an attempt made to prevent the Milwaukee from serving the Island.

Q. But at the present time the Island owned by the City or Port Authority, is served jointly by the Milwaukee and the Northwestern?

A. That is right.

* * * * * * *

[fol. 4948] Otto H. Zimmerman was sworn and testified as follows:

Direct examination.

By Mr. O'Brien:

Q. You are the same Mr. Zimmerman who testified earlier in this proceeding?

A. I am.

* * * * * * *

[fol. 4955] Redirect examination.

By Mr. O'Brien:

* * * * * * *

[fol. 4956] Q. There is one more point I want to bring out. I believe the record should be made clear on it. Is the use of the yard adjoining the Port, the yards of the New York Central and the Illinois Central, for classification purposes and for further hold yard, as you have stated? Would you elaborate on that just a little?

A. Yes, sir. I thought I made it clear yesterday, but apparently I did not. It is ridiculous to say you cannot operate in this little yard that the Port has now presently, without assigning a track to each of the railroads that come in there. I do not think there is a railroad representative in this room, at least on the side of the applicants there isn't, where we do not have such a condition where we have to put two or three different cuts for different railroads on one track in a day's time. And certainly, that would be applicable in this case here. You do not need the fifteen tracks to operate this Port facility.

Now, with respect to other facilities, I said yesterday that when it came to the point or to the time of loading, that the Illinois Central Wildwood Yard would be available as a supplemental yard for this facility, and there is a maximum total capacity about 4,000 cars available in that yard. Also there will be available the Kensington Yard of [fol. 4957] the Michigan Central which is adjacent to and almost at the entrance of the Port, our proposed entrance to the Port. I would suspect and hope that in the event the applicants are granted this application, and the Rock Island comes in with us, that even their facilities for their loading would be available. Those facilities would be available, because we have made the provision, this memorandum of understanding, that any of the roads who can reach the Port are welcome to come in with us.

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[fol. 4959] T. E. Reynolds was recalled to the stand and testified further as follows:

Direct examination.

By Mr. Keating:

Q. You are the same T. E. Reynolds that testified on behalf of the New York Central, Indiana Harbor Belt Railway, and you are superintendent of the New York Central?

A. That is right.

Q. First of all, Mr. Reynolds, I wish to show you what

[fol. 4960] has been marked Exhibit H-106, for identification, a map of Ashtabula, and the red trackage indicated to be that of the New York Central.

A. That is correct.

Q. Who owns these dock facilities?

A. The New York Central.

Q. Those are owned by the New York Central and served solely by them?

A. That is correct.

Q. Are you also familiar with the rail facilities located at the Port of Toledo and Erie and Oswego?

A. Correct.

Q. Are some of those industries in those ports served solely by one railroad?

A. That is right.

Q. Are any of those industries or facilities that are served solely by one railroad located on public property?

A. Not to my knowledge.

Q. They are located on privately owned property, or property owned by the railroads serving them?

A. Correct. There is one thing at Erie I would like to correct. That is that the property shown in black is served by the New York Central. That is property privately owned by the Hammermill Corporation. It is fronting on the water, but there is no facility for waterborne transportation, and further, that facility is also served by the [fol. 4961] Pennsylvania Railroad.

Q. Though the exhibit indicates they are served solely by the New York Central.

A. That is right.

Q. Mr. Reynolds, assuming the application of the New York Central and Indiana Harbor Belt are granted, where will you make classification for the port traffic?

A. At the Kensington Yard.

Q. And the capacity of the Kensington Yard at the present time?

A. 792 cars.

Q. As I understand, that yard at one time operated with a capacity of around 3,000 cars.

A. That is right.

Q. So that yard is presently in existence and can be easily expanded to that capacity.

A. Correct.

Q. In your movement over the proposed route into the port, in which direction will the movement be made? Will that be a backing movement, or will you be pulling the traffic?

A. Well, we will pull into the port and pull out.

Q. Now, you have previously testified that movement by the New York Central and Indiana Harbor Belt will be afoul of the tracks used by the South Shore for approximately five to 8 minutes; is that correct?

A. That is right.

[fol. 4962] Q. Where do you make interchange now of New York Central and Indiana Harbor Belt traffic with the Rock Island?

A. At 115th Street Yard of the Rock Island.

Q. Do you have to cross the tracks used by the South Shore at the present time to effect that interchange?

A. Yes, sir.

Q. Under present operations, how long is your operation extended over the tracks of the South Shore?

A. That is a cumbersome move that we have to make, and due to the present operation it takes about ten minutes.

Q. So that if these applications are granted, and you are permitted to move in over the proposed route, you will make a more direct movement into the port and not being occupying the South Shore tracks for any longer time than you are at present?

A. That is correct.

Q. How many deliveries at 115th Street?

A. As high as two a day. It depends on the amount of traffic.

Q. You were here when Mr. Gilfilian of the Rock Island testified that movement by all of the applicants to and from the Port would result in delays. Do you have any comment on that?

A. I believe that the movements to and from the Port can be scheduled, and that it is a feasible operation.

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[fol. 4978] J. M. TRISSAL was recalled to the stand and testified further as follows:

Direct examination.

By Mr. O'Brien:

Q. Mr. Trissal, you have been previously sworn?

A. I have.

Q. Do you have a statement you wish to make at this time?

A. I do. At the time the agreements attached to the return on the questionnaire in Docket 19538, were under discussion between the applicants who owned or would build segments of track comprising the trackage route proposed, all parties would share in the reciprocal features of the contract.

We believe that the ratio of loaded cars to empties over the route would vary with the development and composi-[fol. 4979] tion of traffic incident to the rapid growth of the Port. In view of the reciprocal situation with respect to offset sub-trackage payments with receipts from trackage use, the inclusion of entering empty cars in the account of assessment charges were not considered to be burdensome to any of the parties at that time.

However, the joining in the proposal to serve the Chicago Regional Port District by applicants seeking trackage right over the segments of track involved in the proposed routes, meant the inclusion of roads receiving no reciprocal payments and who, because of the uniform trackage payments, might incur a net expense for use of the routes.

Under the circumstances, a modification of the agreement was in order and considerable study was devoted to an equitable solution to this condition which resulted in

the provision that empty cars would not be counted in the car count on which trackage charges are to be assessed.

In addition, the provision for reduction in charge after 7,000 car counts per year, would be eliminated wherever it occurs.

Such a modification would eliminate any uncertainty which might exist as to the total expense to any carrier using the proposed route, placing instead the charge per trackage use in each case strictly on the basis of loaded cars.

I am authorized on behalf of all the applicants in this case to state that an agreement for such a modification has [fol. 4980] been reached, and that supplemental agreements to this effect will be filed promptly. It is requested that the supplemental agreements be made a part of the record in this case.

Q. Will the reduction in the charges have any material effect on the total revenue to be derived from these trackage agreements?

A. Because of the anticipated increase in traffic over this route, due to the Belt Railway of Chicago, Indiana Harbor Belt, and New York Central joining with the original applicants, it is not believed that this reduction in charge will have any great effect on the total revenue to be derived from these trackage agreements.

Q. Mr. Trissal, what is the basis for those charges at the present time?

A. The trackage charges for use of Illinois Central and Kensington and eastern facilities, set forth in the agreements attached to the return to the questionnaire, will be determined on the basis of combinations of rental evaluation, reduction of rental to tenant, and amortization of new construction costs over the terms of the agreement.

Q. Do you have anything further you wish to add?

A. I understand that the trackage charge of $2.50 for each loaded car, made against the applicant lines by the Pennsylvania represents the amount required to amortize the investment over the initial period of the several agree-

[fol. 4981] ments of twenty-five years, and to cover interest on the land maintenance and so on.

Q. Does that complete your statement?

A. Yes, sir.

Exam. Albus: Cross examine.

Cross examination.

By Mr. Dwinell:

Q. When did you make that agreement?

A. What agreement?

Q. The one you just referred to, changing the terms of the original agreement.

A. We have been considering that for some time. A final decision on it, however, was made yesterday.

Q. After Mr. Davidson's testimony?

A. I cannot say as to that. I was not at the meeting when the decision was made. I happened to be out on the line so I do not know.

Q. At least, it was not made until yesterday.

A. A final decision was not made until yesterday, although we have been considering it for a long time.

Q. What time yesterday?

A. I do not know.

Exam. Albus: He said that he did not know. He was out on the road.

By Mr. Dwinell:

Q. What time was the decision made?

A. I do not know, sir.

Mr. Dwinell: That is all.

[fol. 4982] Exam. Albus: Mr. Broker, do you have any questions?

Mr. Broker: Yes.

By Mr. Broker:

Q. You say it will not affect the revenues. As I understand it, you are not going to charge for empty cars?

A. That is correct.

Q. You say it will not affect the revenues.

A. We do not anticipate it will, because the original rates were set on the estimated volume of business from the original applicants. And with the inclusion of the additional applicants, we anticipate the inclusion will be sufficiently greater; that there will not be very much net difference in revenue from what was originally contemplated.

Q. For every car that goes in loaded and comes out empty, or goes in empty and comes out loaded, you have lost half of your revenue.

A. If that condition existed.

Q. Thank you, sir. That is all.

• • • • • • •

[fol. 4987]

Transcript of Hearing—Thursday, April 2, 1959

Hearing Room "B,"
Interstate Commerce Commission,
Washington, D. C.

[fol. 5040] ORAL ARGUMENT OF MR. BRUCE DWINELL

• • • • • • •

[fol. 5050] Then they say that switching rates fluctuate, that the Examiner knew that switching rates fluctuate, and that that was the reason he ignored the whole thing.

Now, I don't know what the Examiner knew, and I don't know how the applicants knew what the Examiner knew. [fol. 5051] And then they gave the examples to show the tremendous changes which fluctuations in rates could make.

When I said that their answer was pitiful I am really talking about what I am now going to say. They said, for

instance, that one of the rates which was $11.07 a car had been increased to $11.46 a car, and that another one of the Belt switching rates had been increased from $14.08 to $14.56. Well, our Exhibit A in our exceptions showed that on that first car with a revenue of $11.07, that the deficit from the operations at the port was $2.68. In other words, the total revenue of $11.07 failed by $2.68 to pay their trackage charges, and the costs at the port. And that when increased switching rates was applied that deficit would decrease from $2.68 a car to $2.29 a car.

The other case where the rate was increased was a car where the rate was increased from $14.08 to $14.56. Instead of having 33 cents left to meet all of the other expenses of handling the car from clearing down to the port and back again, instead of having 33 cents left, they would have 81 cents.

I say the Commission is not justified in approving an improvident operation. This is one of the fundamentals of the transportation act.

I go now to my next subject, Calumet Lake is one segment of the port of Chicago. The other segments are located on the north side of the Chicago River, served exclusively by the Chicago & North Western. The facilities [fol. 5052] at the south side of the Chicago River are served exclusively by the Illinois Central.

Calumet River industries—Calumet River lying between Lake Calumet and Lake Michigan, has elevators, warehouses, and industries, served by one railroad, some by another, some by another, some by another, few of them by more than one, all applicants here.

* * * * * * * * *

[fol. 5065] REBUTTAL ARGUMENT OF MR. WILLIAM J. O'BRIEN

* * * * * * * * *

[fol. 5069] The letter that Mr. Dwinell referred to of the president of the Belt, who wrote the letter, stated that the $5 charge was a mere estimate, and he stated that in the letter. And that letter was written before the Belt ever

filed its application and before these other applications were filed, and before the Joint Facility arrangement had been devised. So that it was based on what his people thought one particular railroad might incur in the way [fol. 5070] of expense in operating within the port.

Certainly it is going to be less with the more railroads operating in there. But the fact remains that you have to look at the worst example possible of the Belt, for instance, hauling a carload of grain across town at the charge of $11.46 for grain inbound. Now, if it should happen to pick it up from its own shipper that it individually serves he gets a minimum of $54 a car. Suppose he picks it up from the road haul carrier, that leaves him with his one car of grain and, according to Rock Island testimony, only 43 percent of the cars handling traffic into and from the port during the test period they made, only 43 percent handled grain, if that is it then it means at least 57 percent is going to be other traffic, other traffic that pays $28.80 a car. So that when you add it all up, when you estimate how they are going to come out on any particular load they take over they are going to be well above any expenses that they might incur through trackage charges, rental, or operational costs.

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[fol. 5148]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT No. H-17

Witness A. E. Baylis

ICC Finance Docket No. 19448, et al.

STATEMENT SHOWING GENERAL TYPE OF FREIGHT CARS IN SERVICE FOR THE FOLLOWING ROADS

	NYC	IHB	*P&LE	CRI&P
Box	61,526	976	6,473	17,788
Gondolas	19,662	297	10,839	5,689
Hoppers	32,129	25	9,030	3,176
Stock	1,457	None	None	752
Flat	2,222	100	1	1,681
Reefers, Tanks & Others	530	8	None	948
TOTAL CARS	117,526	1,406	26,343	30,034

GRAND TOTAL 145,275

* Controlled by the New York Central Railroad Company

Source: A.A.R. Semi-Monthly Revenue Car Location Summary Class I Railroads, August 1, 1957.

The Official Railway Equipment Register, I.C.C. R.E.R. No. 324, July, 1957.

[fol. 5151]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT No. H-20

Witness: A. E. Baylis

ICC Finance Docket No. 19448, et al.

CHICAGO SWITCHING DISTRICT

Local Switching Rates	Rate (per 100 lbs.)	Minimum Weight	Minimum Charge
Single Line	8½ Cents	60,000	$51.00
Two-Line (Divides 50-50%)	9½ Cents	60,000	57.00
Three-Line (Divides 37½-25-37½%)	10½ Cents	60,000	63.00

Includes Ex Parte 206-A

Tariff Authority

IHB Tariff 325-O, ICC No. 1088

CJ Tariff 22-W, ICC No. CJ-87

CR&I Tariff 59-T, ICC No. 126

IFA Tariff 21, ICC No. 867

[fol. 5304]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT No. H-27

F. D. No. 19538

Witness: O. H. Zimmerman

ILLINOIS CENTRAL RAILROAD COMPANY

Present and Authorized Equipment

	1957	Authorized 1958
Plain and ventilated box	18,747	750
Auto and other equipped box	1,218	200 Auto 100 DF
TOTAL BOX	19,965	1,050
Gondolas	4,942	
Hoppers (except covered hoppers)	20,239	750
Covered hoppers	1,139	200
Stock	404	
Flat	1,326	
Refrigerator	519	
Pulpwood	2,451	
TOTAL	50,985	2,000
Freight Diesels*	306	

* Authority has been issued for 70 new all-purpose diesel engines to be received from builders during 1958.

[fol. 5306] CLERK'S NOTE

Exhibit No. H-29—"Memorandum of Understanding among The Belt Railway Company of Chicago, et al." is omitted from the record here. It is printed at pages 491-496 supra.

[fol. 5331]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT No. 40

Witness Pevler

Finance Docket No. 19448

STATEMENT OF EQUIPMENT OWNERSHIP OF THE PENNSYLVANIA RAILROAD AND CHICAGO, ROCK ISLAND & PACIFIC RAILROAD AND THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY

	PENNA.*	C.R.I.&P. #	N.K.P. #
Box	67,836	17,898	10,782
Stock	1,144	771	357
Gondola	36,701	5,920	5,953
Flat	3,162	1,754	485
Hopper	61,445	3,287	9,033
Other	542	909	143
Total	170,830	30,539	26,753

*Source—Penna. Ownership Statement C.T. 1087 April 1, 1957.

#Source—The Official Equipment Register—April–1957.

[fol. 5360]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT No. H-49

Witness C. L. Poole

Finance Docket No. 19448

Belt Railway Owner Line Equipment

	Box Cars, Incl. Special Equipment	Common Box Cars	Total Equipment of all kinds
A. T. & S. F.	38,866	35,550	87,207
C. & O.—C&O Dist.	21,555)	21,686	95,163
PM Dist.	939)		
C. & E. I.	2,498	2,374	6,921
C. B. & Q.	22,878	21,967	42,962
C. R. I. & P.	17,854	16,692	30,424
Erie	11,610	10,170	20,885
G. T. W.	8,725	7,506	11,300
I. C.	21,841	18,672	50,985
Monon	1,623	1,483	3,184
Pennsylvania	67,799	59,904	171,676
Soo Line	8,025	7,760	13,462
Wabash	11,629	10,990	17,416
Total	228,042	214,754	551,585

Total Common Box Cars—All Roads—680,359

Source: Official Equipment Register, July 1957.

[fol. 5397]

BEFORE THE INTERSTATE COMMERCE COMMISSION

EXHIBIT H-64

F.D. 19448

9-5-57

LEASE AGREEMENT

A lease agreement made this day of , 1957, by and between CHICAGO REGIONAL PORT DISTRICT, organized under the laws of the State of Illinois, hereinafter called "Lessor", and the following parties, hereinafter referred to collectively as "Lessees":

> The Belt Railway Company of Chicago, Chicago South Shore and South Bend Railroad, Illinois Central Railroad Company, The Pennsylvania Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company.

WITNESSETH:

WHEREAS, Lessor owns land and railroad tracks and appurtenances surrounding Calumet Lake in the City of Chicago, Illinois;

WHEREAS, Lessor desires to develop Calumet Lake as a principal Great Lakes port serving the metropolitan area of Chicago, Illinois, and the nation, and will require the railroad services of Lessees to aid said port development;

WHEREAS, Lessor is willing to lease such of its property and railroad facilities located thereon as may be necessary for the furnishing of railroad service; and Lessees are willing to lease such property and furnish necessary railroad service:

NOW, THEREFORE, the parties hereto agree as follows:

ARTICLE ONE

Covenants of Lessor

Section 1. Lessor agrees to lease to Lessees such land and railroad facilities presently owned by Lessor in the vicinity of Calumet Lake, in the City of Chicago, Illinois, and generally north of East 130th Street and east of Doty Avenue, hereinafter called "Property", more particularly described on attached Exhibit "A".

[fol. 5398] Section 2. Lessor agrees to provide and lease to Lessees such tracks and facilities as may be acquired by Lessor, including but not limited to tracks and facilities located on property covered by leases or contracts with the Pullman Railroad Company and The Philadelphia, Baltimore and Washington Railroad Company referred to in Section 3 of this Article and such additional land and additional railroad facilities as may be required in the future for proper development of the Calumet Lake district.

Section 3. Lessor agrees not to permit any other person, company, corporation or association to construct, lease or operate railroad facilities on its property for the purpose of serving the Calumet Lake district for railroad purposes other than as presently covered by leases or contracts with the Pullman Railroad Company and The Philadelphia, Baltimore and Washington Railroad Company, attached hereto as exhibits "B" and "C", except by written approval from Lessees.

Section 4. Lessor agrees to provide such additional land and to construct such additional tracks and facilities as may be requested by a majority of the Lessees and add the cost of same to the valuation base on which Lessees pay rental under this agreement. In the event any part of the Property shall in the judgment of a majority of the Lessees, not be required for railroad service, it shall be retired and the value thereof shall be deducted from the valuation base on which Lessees pay rental under this agreement. The term Property shall reflect the changes provided for herein.

ARTICLE TWO

Covenants of Lessees

Section 1. Lessees agree to lease from Lessor the Property.

Section 2. Lessees agree, at their sole cost and expense, to maintain said Property and to furnish railroad service adequate to meet reasonable and practical requirements of industries, tenants of Lessor.

[fol. 5399] Section 3. Lessees agree to operate said Property as a joint facility. All tenants of Lessor having railroad industrial tracks will be shown in the directory of industries in the Chicago Switching District tariffs as being served by each of the Lessees. Such tracks will be served for account of such Lessees at tariff rates comparable with like rates charged by each of the Lessees at other industries served by it within the Chicago Switching District.

Section 4. Lessees agree to permit other railroads having physical connections with the Property to become parties to this agreement upon receipt of written application from such other railroads, provided such applicant railroads agree to be bound by the terms of this agreement in the same manner as though they had been original parties to such agreement.

Section 5. The Lessees agree to be jointly and severally obligated to Lessor under this agreement. Should any one or more of the Lessees fail to meet its or their obligations hereunder, such defaulting party or parties shall forfeit all rights hereunder and the remaining parties shall be bound by the terms hereof. Such defaulting party or parties shall also forfeit any right to future participation in the use of said Property and may only be readmitted by unanimous agreement of all remaining parties to this agreement.

SECTION 6. Lessees agree, upon termination of this Lease as herein provided, to return all leased property to Lessor in relatively the same condition as when acquired by Lessees, normal wear and tear excepted.

ARTICLE THREE

MUTUAL COVENANTS OF LESSOR AND LESSEES

SECTION 1. Parties hereto agree that the valuation of the Property, as shown on inventory attached hereto and made a part hereof identified as Exhibit "D", as of the [fol. 5400] date of this agreement shall be ($) and that such valuation shall be currently changed to reflect additions or retirements when made in accordance with Section 4 of Article 1.

SECTION 2. Lessor agrees to lease said leased Property to Lessees for an annual rental based on five (5%) per cent of current valuation as provided in Article Three, Section 1 above. Lessees agree to pay to Lessor said rental in equal monthly payments in advance upon the first business day of each month upon receipt of bill from Lessor, provided, however, that the total rental payable in any calendar year shall not exceed an amount equivalent to $2.00 per car, loaded or empty, or locomotive handled to or from the Property during such calendar year.

SECTION 3. Lessor shall pay for, assume and be liable for all taxes, if any, levied or assessed against the Property.

SECTION 4. Lessor shall construct, maintain, renew, use and remove grade crossings and grade separations for freight and passenger traffic over and across said tracks on the Property hereby demised to the Lessees at the sole cost and expense of Lessor, the location and number of which grade crossings and grade separations shall be determined by mutual agreement of the parties hereto. The expense of crossing protection required at such grade crossings shall be borne by the party desiring such protection.

Lessor hereby agrees to hold Lessees and each of them harmless of any loss or damage to property, or injury to or death of persons, arising in any manner out of the use of the said grade crossings unless such loss or damage, or injury or death, is attributable to the sole negligence of the Lessees or any of them.

SECTION 5. Parties hereto agree that all liability for injury to or death of persons and loss and damage to property arising as a result of the sole fault or negligence of Lessees shall be solely borne by Lessees.

[fol. 5401] Liability arising from sole fault or negligence of Lessor, its agents or employees shall be solely borne by Lessor.

Except as otherwise provided in this agreement, liability arising from joint fault or negligence of the Lessor and Lessees shall be borne equally by Lessor and Lessees.

SECTION 6. Lessees shall have the right to sub-lease or assign the leased property but shall continue to be liable to Lessor under this Lease.

SECTION 7. This lease shall be in effect and binding upon the parties hereto, their successors or assigns effective and remain in effect for a period of twenty (20) years thereafter, with the option in Lessees, or such of them desiring to renew, for renewal for four (4) additional terms of twenty (20) years each on the same terms and conditions. In the event of any such renewal, Lessees, or such of them desiring to renew, shall notify Lessor in writing one year before the expiration of the initial term and thereafter one year before the expiration of any renewal.

[fol. 5402] IN WITNESS WHEREOF, the parties hereto have executed this Lease Agreement, in septuplicate, the day and year first above written.

Attest: CHICAGO REGIONAL PORT DISTRICT

....

Secretary President

Attest: THE BELT RAILWAY COMPANY OF CHICAGO

....

Secretary President

Attest: CHICAGO SOUTH SHORE & SOUTH BEND RAILROAD

....

Secretary President

Attest: ILLINOIS CENTRAL RAILROAD COMPANY

....

Secretary President

Attest: THE PENNSYLVANIA RAILROAD COMPANY

....

Assistant Secretary Vice President and Regional Manager

Attest: THE NEW YORK CENTRAL RAILROAD COMPANY

....

Secretary Vice President

Attest: INDIANA HARBOR BELT RAILROAD COMPANY

....

Secretary Vice President

[fol. 5755]

EXHIBIT No. H-88

BEFORE THE INTERSTATE COMMERCE COMMISSION

WITNESS: L. B. PRITCHETT

F. D. 19448

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 16252

PULLMAN RAILROAD COMPANY CONTROL, ETC.

Submitted September 20, 1949 Decided November 17, 1949

Acquisition of control by the Chicago, Rock Island & Pacific Railroad Company of the Pullman Railroad Company through purchase of capital stock, and lease by the former of the railroad property of the latter approved and authorized. Conditions prescribed.

W. F. Peter, A. B. Enoch, and Bruce Dwinell for applicant.

J. R. Barse, Erle J. Zoll, Jr., Vernon W. Foster, Joseph H. Wright, H. T. Newcomb, S. C. Murray, and V. L. Lewis for interveners.

REPORT OF THE COMMISSION

DIVISION 4, COMMISSIONERS MAHAFFIE, MILLER, AND MITCHELL

BY DIVISION 4:

Exceptions to the report proposed by the examiner were filed by the Illinois Central Railroad Company, and the case has been argued orally.

The Chicago, Rock Island and Pacific Railroad Company, hereinafter sometimes referred to as the applicant or Rock Island, applied September 1, 1948, for authority under section 5(2) of the Interstate Commerce Act, as amended, (1) to acquire control, through stock ownership, of the Pullman Railroad Company, hereinafter sometimes called Pullman, and (2) to lease for an initial term of 5 years the railroad property of the latter. A hearing was held at Washington, D. C., on October 6 and 7, 1948, and a further hearing was held at Chicago, Ill., on January 19, 1949. Briefs were filed. Petitions for leave to intervene were granted, at or before the hearings, on behalf of the Illinois Central Railroad Company, Kensington & Eastern Railroad Company, Indiana Harbor Belt Railroad Company, Chesapeake & Ohio Railway Company, Belt Railway Company of Chicago, and the New York Central Railroad Company, lessee of the Michigan Central Railroad. Hereinafter interveners will be referred to by the distinctive names in their respective corporate titles, except that the Belt Railway Company of Chicago will be called the Chicago Belt.

No representations have been made by State authorities. An assistant corporation counsel for Chicago, testifying on behalf of the Rock Island, stated that the city favored granting the application, as such action would be in conformity with a recent order of the city council to secure the services of a trunk-line carrier for the Lake Calumet Harbor facilities owned by the city. Unless otherwise indicated, all points mentioned herein are in the State of Illinois.

[fol. 5756] ROCK ISLAND SYSTEM

Corporate organization and present operations.—Applicant, a Delaware corporation, was organized December 16, 1947, for the purpose of acquiring the railroad properties formerly owned by its predecessor, the Chicago, Rock Island and Pacific Railway Company. Operation of these properties was commenced by applicant on January 1, 1948. System lines, aggregating some 7,650 miles, serve 14 mid-

and south-western States, and at Tucumcari, N. Mex., connect with the Southern Pacific to form a through route to the Pacific coast.

Equipment.—As of January 1949, the Rock Island owned 453 freight locomotives used in road service, and 143 switching engines, of which 16 and 95, respectively, were Diesels. It also owns 27,601 freight cars of various classes.

Description of facilities at Chicago.—Rails of the applicant enter the Chicago area at Blue Island, on the outer limits of the Chicago switching district, and extend northwesterly to the terminal at LaSalle Street Station, approximately 16 miles. From the terminal to 87th Street, approximately 10.2 miles, the main line is elevated, and from 87th Street to 115th Street the right-of-way passes through a residential section which precludes any industrial development. Between 115th Street and the city limits at 119th Street, a small area of land is available for development but is avoided by heavy industries because of the restrictions on noise and smoke.

A suburban line, also serving a strictly selected residential area, extends west of the main line from Blue Island northerly to 89th Street and thence easterly to Gresham Station at 87th and Vincennes Streets. The South Chicago branch, of which 4.1 miles are elevated, takes off the main line at 91st Street and extends eastwardly from the Rock Island crossing at Grasham to Ewing Avenue on the Calumet River in South Chicago, a distance of approximately 5.42 miles. Generally, this line parallels 95th Street, an important business thoroughfare, and is bounded on both sides by housing projects. The Irondale branch connects with the South Chicago line at 95th Street and Torrence Avenue and extends southerly 1.63 miles to the 107th Street dock on the Calumet River. The South Chicago and Irondale branches now serve 18 industries and with the construction of a large grain elevator, about to be completed at the end of the former, all the land in the tributary territory will be occupied.

Applicant's Burr Oak yard at Blue Island has a capacity of 3,800 cars, and its South Chicago yard in the vicinity of 95th Street has a capacity of 900 cars. The Rock Island handles between 450 and 500 in- and out-bound cars each work day in this general district.

Interchanges.—Rock Island, at present, connects with Chicago Belt at the South Chicago yard and at the latter's 53rd Street Clearing yard where facilities are available to afford interchange between the applicant and all trunk-line carriers serving Chicago. Connection for the interchange of traffic between Rock Island and Indiana Harbor Belt is effected at Blue Island.

Preliminaries leading to proposals.—Because of the dearth of Chicago industries now served, the industrial commissioner of the Rock Island made an inspection of the South Chicago area with a view to acquiring additional space within which to locate new enterprises. Between September and December 1946, the matter was studied, and on December 31, 1946, recommendation was made to the president of the Rock Island that consideration be given to the purchase of Pullman. Negotiations between the presidents of the respective companies were instituted early in 1947, and culminated in the proposals now presented for our consideration.

Pullman Railroad

Corporate organization and affiliation.—The predecessor of Pullman has been in existence since 1880; the present company was incorporated under the laws of Illinois as a railroad in 1907. All the outstanding capital stock of Pullman, consisting of 5,000 shares of common stock of the par value of $100 each, is owned by the Pullman Finance and Properties Company, which in turn is controlled through capital stock ownership by the Pullman Standard Car Manufacturing Company.

[fol. 5757] Railroad property and equipment.—Pullman operates a line of railroad extending from a point about 500 feet north of 95th Street to a point on the southern shore of Lake Calumet in the vicinity of 130th Street, a distance of between 4 and 5 miles. Including yard and sidetracks, its operation covers about 19 miles. Eleven different industries are served. The line crosses 95th Street by means of an overhead steel and concrete viaduct. The segment between 104th and 115th Streets is owned by the Pullman Standard Car Manufacturing Company, but is operated and maintained by Pullman under a lease dated June 30, 1913, for a term of 99 years. Pullman has trackage rights over the Rock Island from Pullman Junction eastwardly to South Chicago, approximately 4 or 5 miles. A seven stall roundhouse, a two-story office building, and a yard office owned by Pullman are located on the leased property. Team tracks are situated at 103rd, 115th, and 130th Street, and at Cottage Grove Avenue. Owned equipment includes two Diesel switching locomotives built in 1941, two steam engines, and a few box- and flat cars. The steam locomotives are in fair condition and are kept for emergency use. The other equipment is maintained in good physical condition. The railroad property is free from funded or other debt. No deferred maintenance thereon exists.

Valuation data.—The value of the Pullman-used property for rate-making purposes as reported by division 1, as of June 30, 1919, was $648,365. Additions and betterments less retirements, from the date of valuation to June 30, 1948, as reported by the carrier, amounted to $563,151.

Interchanges.—Direct connection for the interchange of traffic between Pullman and 12 other railroads are made at 5 different points as follows: Rock Island's South Chicago yard at 95th Street and Stony Island Avenue; a Pullman-owned track located south of 95th Street and west of the South Chicago yard; Pullman Junction yard at

97th Street; Pullman and Kensington's yard at 116th Street; and a Pullman siding at 124th Street.

Transportation charges.—Primarily, Pullman is a switching carrier with tariffs on file publishing rates on interplant and Chicago district switching service. It is also party to trunk-line tariffs in which the Pullman charges are absorbed out of the through rate on all line-haul traffic. Local rates between points on Pullman are covered by a published tariff and are in the nature of industrial switching charges. According to its own classification, there were a total of 1,967 local movements made between points on Pullman in 1947. A breakdown showed that these designated local movements included 1,925 coaches and 30 loads; the remaining 12 presumably were empties. No passenger service is operated.

Employees.—Pullman has about 40 employees, 3 of whom would be taken over and absorbed into the Rock Island system and the others would remain on the Pullman property. Under the circumstances, it appears that no railway employees would be adversely affected by the proposal. However, in the absence of an agreement for employee protection, we will impose conditions with respect to employees similar to those contained in Chicago & N. W. Ry. Co. Merger, 261 I. C. C. 672.

STOCK PURCHASE AGREEMENT

Pursuant to the terms of a contract executed August 26, 1948, Rock Island agrees to purchase from the Pullman Finance and Properties Company, hereinafter called the seller, all the issued and outstanding capital stock of Pullman, consisting of 5,000 shares of common, for $1,175,000, payable in cash concurrently upon delivery by the seller of the certificate or certificates representing the stock properly endorsed and bearing the requisite United States revenue stamps. The purchase agreement is made subject to our approval, but in the event such approval is not obtained by March 1, 1949, the agreement shall be of no further

force or effect. Counsel for applicant informally advised that by proper amendment, the parties have agreed that the time limitation for our approval has been extended to December 31, 1949. As of June 30, 1948, after eliminating $85,000 temporary cash investments authorized to be withdrawn and distributed to the seller, the excess of Pullman's current assets over current liabilities as shown by its balance sheet amounted to $98,047. The agreement provides that any increase or decrease in such excess amount, representing earnings or losses from operation from June 30, 1948, to the consummation date, are to be added to or deducted from the purchase price in order that the same may reflect the results of operation by Pullman during that period. The seller agrees that pending consummation, [fol. 5758] Pullman will continue to maintain the property at existing standards, and to keep its books and accounts in accordance with our regulations. Any deficiency in income and other Federal taxes occurring prior to the consummation date shall be borne by the seller. The agreement is to inure to the benefit of and be binding upon the parties and their respective successors or assigns. The consideration to be paid was arrived at after considerable negotiations between the parties, and is stated to reflect the book value of the Pullman's rights in and to the property involved.

Land Purchase Agreement

By a separate contract of the same date, the Rock Island Improvement Company, a wholly owned noncarrier subsidiary of applicant, agrees to purchase from trustees of the Pullman Land Association, for a consideration of $1,025,000, certain parcels of real estate, aggregating approximately 355 acres, situated adjacent to the Pullman line of railroad. Satisfactory titles to each parcel involved must be furnished, otherwise the land-purchase agreement, as well as the stock-purchase agreement, shall be of no further force and effect.

Lease Agreement

Following acquisition of control through purchase of capital stock, Rock Island proposes to lease all the property of Pullman, including contracts, franchises, ordinances, permits, cash on hand or in transit, traffic and car-service balances, bills receivable and claims or causes of action, for a term of 5 years. As rental, the Rock Island agrees to pay $100 annually; all taxes, except Federal income taxes, imposed, assessed, or levied upon the demised premises, or upon the earnings thereof; all compensations due or owing by Pullman under the provisions of any lease, trackage arrangement, or operating contract; and an amount each month equal to the charges or deductions allowed Pullman by the Bureau of Internal Revenue for amortization or depreciation on the property leased. Rock Island agrees to maintain the leased property; make all additions and betterments it deems necessary or desirable; and, at the termination of the lease, surrender the demised premises in good condition, ordinary wear and tear excepted. If Rock Island fails to perform any of the covenants contained in the lease, and such default continues for a period of 3 months after written notice from Pullman, then the lessor may at any time proceed by proper action at law or in equity to enforce performance of such covenants, or to recover damages for the breach thereof, or terminate the lease by written notice.

Unified Operations

It is the purpose of applicant to integrate the Pullman property into the Rock Island system for operation if the instant application is granted. The lease was made for a short term in order to work out the problems which may arise as a result of unified operations before any attempt would be made to assimilate the property itself through a conveyance by deed. In the meantime, Pullman would be operated in the same manner as the South Chicago and Irondale branches of the applicant's system.

As few changes as possible would be made in the manner of Pullman's present operation. Negotiation will be undertaken to preserve and continue all existing connections, especially that with the Illinois Central and the Indiana Harbor Belt at the 115th Street yard. If this cannot be arranged, interchange between the Rock Island and the Illinois Central, on traffic to and from the South Chicago district, will be made at Clearing yard via the Chicago Belt, as agent, and with the Indiana Harbor Belt at Blue Island. It is generally agreed by all concerned that the presently existing interchange with the Illinois Central on the refuse traffic, hereinafter described, is preferable from the standpoint of efficiency and expedition. Cars for the Chesapeake & Ohio and the New York, Chicago & St. Louis would be delivered in their Calumet yard at 103rd Street, instead of on a wye track owned by Pullman at 95th Street. Rock Island intends to use the Pullman Junction yard as an assembly and distributing yard for cars originating at or destined to industries located on Pullman. It will handle these cars without additional expense to and from the South Chicago yard together with the traffic Rock Island now moves. Under the proposal, Rock Island service at the industries will be afforded twice daily instead of once a day now made by Pullman.

[fol. 5759] BALANCE SHEETS

As of June 30, 1948, the balance sheets of Rock Island and Pullman, in order, showed the following: Total investments $327,007,594, $851,177; current assets $82,502,500, $266,354; deferred assets $610,247, $50, unadjusted debits $1,499,821, $132,506; capital stock $211,472,842, $500,000; long-term debt $96,298,249, none; current liabilities $38,196,936, $83,819; deferred liabilities $544,612, none; unadjusted credits $6,616,617, $1,844; and surplus $61,490,906, $664,424.

PULLMAN TRAFFIC

Pullman handles an average of 110 cars, in-and outbound, each working day. An exhibit of record filed by the applicant shows the number of cars handled in interchange service by Pullman during the years 1944-47, and the first 6 months of 1948, in order, as follows: Direct with other carriers, received, 7,367, 7,331, 8,281, 7,815, and 4,910, forwarded, 8,567, 8,550, 9,159, 9,084 and 5,315; via Chicago Belt, received, 8,461, 7,486, 6,030, 6,114, and 2,343; forwarded, 7,624, 6,670, 5,502, 5,525, and 2,300; via Indiana Harbor Belt, received 4,749, 4,225, 2,959, 3,113, and 1,538; forwarded, 4,310, 4,075, 2,925, 2,701, and 1,351; subtotals received and forwarded, 41,078, 38,337, 34,856, 34,352, and 17,757; handled in intermediate service between other carriers, 642, 639, 1,158, 2,395, and 1,704; and grand totals 41,720, 38,976, 36,014, 36,747, and 19,461. The foregoing statistics, compiled by the applicant from Pullman's records, include empty as well as loaded freight cars handled in road-haul service to or from points beyond Chicago in which Pullman participated and cross-town movements entirely within the Chicago switching district. New and reconditioned passenger coaches moved to and from the Pullman Standard Car Manufacturing Company also were included.

A breakdown of the cars handled by Pullman in direct interchange with other carriers indicates that the Illinois Central portion was largest. Eliminating a specialized movement of refuse originated by that carrier in downtown Chicago destined to the Lake Calumet area for filling purposes, the total direct interchange between Pullman and Illinois Central for the periods shown above amounted to 4,255, 3,361, 3,043, 3,118, and 1,657 cars. Direct interchange of cars between Pullman and other railroads during the years 1944-47, and the first 6 months of 1948, in order, was as follows: With the Michigan Central, 2,474, 2,132, 2,550, 2,283, and 931; Rock Island, 997, 1,715, 812, 668, and 311; Baltimore & Ohio 905, 965, 1,195, 1,144, and 597; Chesapeake & Ohio, 511, 700, 748, 647, and 177; Chicago, South Shore &

South Bend and connections, 633, 288, 325, 685, and 340; Chicago, West Pullman & Southern and connections, 454, 616, 1,105, 479, and 268; and New York, Chicago & St. Louis and connections, 861, 919, 776, 671, and 326. Of the cars handled in interchange via Chicago Belt and Indiana Harbor Belt, respectively, 1,607, 939, 622, 541, and 170 were to and from industries served by the former, and 1,341, 1,712, 2,346, 3,647, and 2,073 to and from industries local to the latter. The intermediate service was performed in connection with cars moved between Chicago, South Shore & South Bend, Chicago, West Pullman & Southern, Indiana Harbor Belt, Michigan Central, or Rock Island, on the one hand, and various Chicago trunk lines, on the other.

Existing Rates and Routes

Rock Island proposes to preserve existing rates and routes, and is willing that, in approving the application, we impose conditions to that effect. Exception is made in those instances where certain rates on cross-town switch movements would be reduced, and where general fluctuations are made under our orders or pursuant to law. Charges for the cross-town service are based on the multiple haul involved, and range from 5¼ cents per 100 pounds for single-line hauls to 6¼ cents for two-and 7 cents for three-line hauls; all with a minimum weight of 60,000 pounds. These rates do not include a 6 percent interim increase. The freight traffic manager of the applicant stated that based on a study of 483 cars actually handled by Pullman in intra-district switching service during the months of January, March, and July, 1948, the estimated saving to the public would approximate $2,209.50, which projected for 12 months would amount to $8,838, if Pullman were part of the Rock Island system. Such savings would materialize through the elimination of intermediate switching carriers, and this probably also would result in the event any other trunk-[fol. 5760] line connection acquired the Pullman property. On line-haul traffic, as distinguished from cross-town switching, the Rock Island division would be approximately

90 percent greater than the proportion payable to Pullman and absorbed by the line-haul carriers out of the through rate. If the instant application is approved, applicant intends to apply its standard basis of divisions, thereby avoiding the necessity of maintaining different division sheets on traffic from the same origins to different destinations on the Rock Island system in the same general switching area. The traffic witness for applicant testified that the keeping of separate division sheets for Pullman traffic would be undesirable. He stated that ordinarily switching in a terminal district is a reciprocal proposition between the railroads operating in the area, and is not based on distance or the service rendered. The charges assessed are usually nominal and are uniform as between all carriers.

Applicant contends that the business now handled by Pullman could be assimilated into Rock Island operations without congestion or delay. It expects to use three switch crews on the Pullman property in 24-hour service so as to provide adequate and prompt handling of cars from and to the industries located thereon. Rock Island now owns ample power to afford this additional service.

Pro Forma Income Account

On the basis of the actual traffic handled by Pullman in 1947, to which was applied the rates in effect on September 1, 1948, and the current labor and material prices, the applicant estimates that the annual income of Pullman property under Rock Island control would be $120,297. In arriving at that estimate, no consideration was given to the higher divisions in effect on the Rock Island, but some adjustments in other respects were made. Railway operating revenues totaling $386,596 represent revenues on line-haul and cross-town switching traffic, demurrage, and miscellaneous revenues made up principally of weighing charges. Railway operating expenses are shown as $140,275, and were compiled by taking the Pullman payroll for May 1948 as an average month, and multiplying it by 12. Average cost of materials a month, multiplied at the August

1948 level, and the charges and credits which would continue under Rock Island's control were added. In the main, all traffic and general overhead expenses were eliminated, as were also the salaries of 5 officers and employees in the amount of $56,486. Railway tax accruals were increased approximately 25 percent to reflect the higher rate paid by Rock Island. The actual net income of Pullman for the fiscal year ended August 31, 1948, was approximately $58,000.

Lake Calumet District

Location.—Generally speaking the Lake Calumet district extends between 103rd and 130th Streets, the harbor being located east of Doty Avenue. Both 130th Street and Doty Avenue are heavily traveled arterial highways.

Potential development.—Plans for the industrialization of the territory adjacent to the southern end of the lake have been under consideration for many years. In 1921 the State of Illinois passed appropriate legislation authorizing the construction of a deep water harbor in Lake Calumet, and granted to Chicago the right, title, and interest to the property concerned. This area is accessible by rail, highway, and water carriers, and public utilities, such as gas, electricity, and water facilities necessary for industrial development are available. The Federal Government has done some dredging and the city has constructed docks and filled in a small area of land, but considerable work remains before all the benefits planned are completed. Contemplated industries to be established in the area include facilities for the transfer of coal from railroad cars to lake steamers, a large grain elevator, and a rail-water-truck terminal. The possibilities of industrial development in the area involved are tremendous and Pullman, as presently located, is in a strategic position with respect to the rail service that might be needed therein.

Pursuant to a contract dated July 23, 1917, between the city of Chicago and the Pullman interests relating to the

general subject of land boundaries, riparian rights, etc. in the Lake Calumet district, Pullman undertakes to furnish rail transportation without discrimination, equal service, rights, and privileges to the city and to any and all railroad or transportation companies existing within or entering Chicago.

[fol. 5761] Existing industry.—The only industry now located at the southern extremity of Lake Calumet is the United States Navy warehouse near 130th Street. During the war it was served exclusively by Pullman and was used to assemble ship sections manufactured at the Pullman Standard Car Manufacturing Company. The rail transportation was in the nature of an interplant movement, involving a distance of possibly 1.5 miles, and requiring great clearances. After the termination of hostilities, portions of the warehouse were leased for storage purposes, and since that time it has been turned over to the War Assets Administrator for disposal. Rail service to the warehouse continues to be furnished by Pullman occasionally.

Rail service in past.—The Michigan Central, lessor of the New York Central, was the first railroad to build into the area. In 1852 it constructed a line extending from the Indiana-Illinois State line to Kensington. This line was used to serve the Swift and Knickerbocker ice houses then located west of Lake Calumet in the vicinity north of 127th Street. Much later Pullman and the Illinois Central, through its wholly owned subsidiary, the Kensington & Eastern, were extended into the territory but rail service to the ice houses was performed exclusively by Pullman from about 1915 until those industries disappeared. The tracks to the Knickerbocker plant were removed after a fire destroyed that ice house in 1921, and the rails to Swift were removed in 1934.

Chicago Belt

Operations.—Capital stock of the Chicago Belt is owned in equal amounts by the applicant and 11 other trunk-line

carriers serving Chicago. Main lines of the proprietary companies extend from the Atlantic to the Pacific Oceans, and from Canada to the Gulf of Mexico. Through Canadian ownership of 2 proprietary companies, all of Canada is also served. The Chicago Belt performs a switching and transfer service for its connections at Chicago, in addition to switching for more than 400 industries along its line. It is located entirely within the Chicago switching district and extends from Cragin, at Cicero and Grand Avenues, south to 67th Street, approximately 10 miles, and thence east and south for about 15 miles to South Chicago in the vicinity of 106th Street and the Calumet River. It has trackage rights over the Chicago & Western Indiana Railroad between Pullman Junction and the Illinois-Indiana State line west of Hammond, Ind., and between the 87th Street yard and Dolton; and over the Baltimore & Ohio Chicago Terminal between Argo and Proviso yard of the Chicago & North Western. It also owns dock facilities on the Calumet River at 102nd Street used for the transfer of coal from railroad cars to boats for transshipment across the lakes. Pursuant to a 1912 agreement, all proprietary companies have trackage rights over the Chicago Belt.

Yard facilities, connections, etc.—Chicago Belt has 9 yards, the largest with a capacity in excess of 10,000 cars at Clearing where interchange is effected with all proprietary companies. Connections at various points are made between the Chicago Belt and every road-haul carrier operating at Chicago, and with all switching lines except the Chicago Junction Railway. Transfer of traffic between the latter and Chicago Belt requires a three-line movement. Some vacant land suitable for industrial development is owned by Chicago Belt along its right-of-way but not much of it is zoned for heavy industries. Most of the heavy industries at Chicago are beyond the city limits although within the Chicago switching district. Chicago Belt, through its industrial department, competes with its proprietary companies and with Pullman for the establishment

of industries on property zoned for manufacturing purposes.

Negotiations with Pullman.—About November 1, 1947, the president of Chicago Belt received an offer from the Pullman interests to sell Pullman and approximately 650 acres of land for the sum of $5,000,000. The land offered to Chicago Belt was more extensive than that now sought to be acquired by the Rock Island. Chicago Belt's board of directors met to consider the proposition on November 11, 1947, and after obtaining certain additional information, the matter was referred by the board to the executive committee for further consideration, report and recommendation on December 10, 1947. Thereafter the executive committee made an analysis of the accounts, the corporate records, and the physical condition of Pullman. Because of the detailed nature of this investigation, its completion required between 3 and 4 months. On or about March 30, 1948, the chairman of the executive committee had a con- [fol. 5762] ference with the president of Pullman and submitted to him a list of interrogatories relating to the physical properties of Pullman and the additional land involved. Pullman's reply was received April 27, 1948, and a progress report was submitted to the board of directors 4 days later. A tentative report was drafted and circulated by the chairman to the other members of the executive committee on June 10, 1948. The committee concluded that it would be necessary to refer certain phases of the situation to a group of real estate, industrial, and tax experts in order to resolve several complex questions to the committee's satisfaction. This investigation continued from July 19 to September 13, and at a special meeting held September 17, the executive committee drafted its report to the board of directors. The report was submitted through the president of Chicago Belt to the directors on September 20, 1948, and was considered by them at a special meeting held on September 30, 1948. As a result of that meeting the executive committee was instructed to inquire from the Rock Island whether that company would entertain an offer from Chi-

cago Belt to acquire the Rock Island's interest in the contract of purchase of Pullman's railroad and land, or in the alternative, whether Rock Island would entertain a proposal for a joint acquisition of the Pullman property by Rock Island and Chicago Belt. The Rock Island refused to entertain either of the proposals submitted to it by the Chicago Belt; the refusal being reported orally by the chairman of the executive committee to the board of directors at its next meeting on October 12, 1948.

Chicago Belt's position.—This intervener contends that under Rock Island control, Pullman cannot furnish equal service without discrimination to the other railroads serving Chicago; that because of Chicago Belt's policy of neutrality as to solicitation and routing of freight in all instances, even as between proprietary and nonproprietary companies, and its lack of interest in line-haul traffic, public interest would be better served, and the preservation of Pullman's independent status best maintained, if control were acquired by a switching carrier, especially one owned and controlled by the largest number of railroads serving Chicago, namely the Chicago Belt, rather than by a single trunk-line; and that such operation and control would result in more expeditious service at lower costs thus tending to develop the industrial possibilities of the tributary territory more rapidly.

In support of its contentions, Chicago Belt cites the phenomenal development of industries on a 3-miie stretch of land situated directly north of its Clearing yard. At the time this yard was completed in 1915, only 5 industries were served. Today 125 diversified industries are located on the Chicago Belt in the Clearing industrial district. The growth is largely attributed by Chicago Belt to its policy of neutrality, and to the fact that it is interested only in providing good dependable switching service to the industries on its line.

Chicago Belt urged that the application be denied, and that it be permitted to acquire control of Pullman. If, how-

ever, we should conclude to grant the authority applied for by the Rock Island, such authority should be given only upon certain well defined conditions which would insure continuation of the present free, open, and impartial operation of Pullman. The conditions suggested are similar to those imposed in *Chicago Junction Case,* 71 I.C.C. 631, 639, *Chicago Heights Term. T. R. Co. Control,* 124 I.C.C. 753, 760, *Wabash Ry. Co., Acquisition,* 154 I.C.C. 155, 162-3, and other cases.

Following service of the proposed report, counsel for Chicago Belt advised that, in his opinion, the conditions recommended by the examiner represent the minimum that should be required in order to maintain the neutrality of service by Pullman under applicant's control, and that if such recommended conditions were followed by us, Chicago Belt would not be disposed to urge exceptions to the report proposed by the examiner. Our conditions herein are substantially those recommended.

Shipper interest.—The sole shipper witness to appear at the hearings was the manager of a warehousing company with a warehouse served by the Chicago Belt at the docks on the Calumet River in the vicinity of the 100th Street yard. The company is engaged in marine and rail terminal operations, and owns a total of seven warehouses in Kansas City, Mo. and Chicago, five of which are satisfactorily served by trunk-line carriers. The other warehouse, located at 35th Street, is switched by the Chicago River & Indiana Railroad. The company is very much interested in any development or improvement of the Lake Calumet Harbor area, especially to the extent that warehousing service might be warranted. The witness stated that, in his opinion, the rail service required at an inland warehouse is different from the service at a water terminal because of the uncertainty of boat arrivals requiring switches at ir- [fol. 5763] regular hours, and of the need for numerous and varied types of equipment on short notice. He further stated that, based on his experience of the service rendered by Chicago Belt at the Calumet River docks, the industrial

development of the Lake Calumet territory would be accomplished more rapidly and at less cost to the shippers if the rail facilities were operated by an entirely neutral switching line having no interest in the line-haul routing of freight originating or terminating in the area. The witness admitted, however, that assuming the services were equal, no preference between a trunk-line and a switching carrier would exist except from a financial standpoint in those instances where an interchange from the trunk line to another trunk line would entail the participation of an intermediate carrier.

Illinois Central

Operations in area.—Illinois Central claims the right to serve the Lake Calumet harbor district by virtue of its ownership of the nonoperating Kensington and Eastern. The line of the latter connects with the former at 115th Street, extends southeasterly to a point south of 130th Street, and thence eastwardly to the Illinois-Indiana State line. The Kensington & Eastern is operated under lease by the Chicago, South Shore & South Bend Railroad, but the Illinois Central has the right to operate over it between the connection at 115th Street and the Pullman connection at 124th Street. No industries are on this segment; the tracks at the 115th Street connection being elevated. It is contended that when the Kensington & Eastern line was placed in operation in 1909, the Illinois Central or the Kensington & Eastern performed service to the ice houses. Pursuant to an agreement dated January 10, 1910, between the Kensington & Eastern and the Michigan Central, the former undertook to construct and maintain a portion of a connecting track and to switch cars, including those to and from the ice houses, in consideration of the latter constructing the remaining portion of the connection and removing three spurs extending across the Kensington & Eastern right-of-way, used by the Michigan Central in serving the ice houses. At no time did the Illinois Central or the Kensington & Eastern, either with owned rails or under

trackage rights, serve the area north or east of the Pullman line of railroad as it exists today. The Illinois Central contends, however, that it always has been ready and willing to provide transportation service to anyone desiring such service, and that the area involved is naturally tributary to its line of railroad. It admits that the area also is within the orbit of the Michigan Central.

Interchange with Pullman.—Two methods of interchange are used in transferring cars from the Illinois Central to Pullman; the first, which includes cars also to the Chicago, South Shore & South Bend and the Michigan Central, involves assembling in the Illinois Central's Wildwood yard and delivery made by a switch engine to the carrier designated. The second interchange is in connection with the refuse cars mentioned heretofore. The refuse traffic is loaded on the Illinois Central in downtown Chicago at 26th Street or South Water Street and delivered via the 124th Street connection to Pullman's No. 1 track at 116th Street. Special equipment and handling of this traffic is necessary because of its highly objectionable nature to the residential district through which it is hauled. The volume averages from ten to fifteen carloads each night, and produces revenue at the rate of $29.50 a car divided equally between Pullman and Illinois Central. On the return trip the Illinois Central engine picks up the empties unloaded during the day, together with any other carload traffic it might receive from Pullman industries. If as a result of approval of the instant application interchange of the refuse traffic is made via the Chicago Belt, a delay of 24 hours would be encountered and additional equipment would be required.

Participation in future development of area.—On March 8, 1947, the Illinois Central and the Kensington & Eastern filed an application with the Illinois Commerce Commission for permission to construct a spur line across Pullman's right-of-way and Doty Avenue in the vicinity of 127th Street. The application was granted but the project is in abeyance pending further hearing with respect to certain

engineering features of the proposed spur. The Illinois Central states that construction of the spur will enhance the industrial development of the territory to be served.

As stated above, plans for the industrialization of the southern portion of the Lake Calumet area include a facility for transferring coal from railroad cars to lake vessels. The [fol. 5764] Illinois Central contends that the construction of this facility is imminent because of the inefficiency and high operating cost of the transfer facility now located on Chicago Belt at 101st Street. The inferiority of the Chicago facility is emphasized by a comparison with similar coal-transfer machinery at Lake Erie ports. Present capacity at Chicago is 1,200 tons an hour while on Lake Erie it is from 2,000 to 3,000 per hour. All types of cars can be handled at Lake Erie ports but only hopper cars can be used at Chicago, and the charge at the former is 14 cents per ton as against 19 cents at the latter. The Chicago facility is not equipped to prevent breakage, and it is stated that the yard facilities serving the dumping facility are inadequate.

The Illinois Central contends that it is the logical railroad to serve the new facility. Such contention is based on the proposition that it is the principal carrier of coal from the Illinois, Indiana, and western Kentucky coal fields, from which the great preponderance of coal to move through the proposed facility will originate. A total of 154 active mines are located on the Illinois Central in that territory. None are on the Rock Island. In 1947, more than 75 percent of the lake cargo coal handled through the transfer facility on the Chicago Belt moved into Chicago over the Illinois Central. In that year the Illinois Central hauled 24,388,297 tons of coal as compared to only 5,375,692 tons by the Rock Island. The Illinois Central further contends that its Wildwood and Markham yards are superior to the inadequate yard space available either on the Chicago Belt or the Rock Island to support efficiently the potential expansion of coal traffic contemplated at Chicago. It is confident that the proposed facility will develop between 5,000,000 and 6,000,000 tons of coal traffic annually.

It is pointed out that because the present transfer facility at Chicago is on the Chicago Belt, the line-haul carriers last year were required to absorb, at the rate of 40 cents a ton, almost $800,000 in switching charges, of which more than $600,000 was paid by the Illinois Central. In addition, the Illinois Central effected an adjustment resulting in a reduction of line-haul rates on coal which cost it approximately an equal amount, making a total contribution of more than $1,200,000 by the Illinois Central in developing this traffic.

Participation in Pullman traffic.—In addition to the future development of the Lake Calumet area, the Illinois Central is also vitally interested in the existing traffic moving to and from Pullman industries. An exhibit submitted by the Illinois Central traffic witness shows that of the 16,899 cars in direct interchange between Pullman and carriers other than Chicago Belt or Indiana Harbor Belt in 1947, 10,164, or 30 percent of the total interchange, were with the Illinois Central, and only 688 or 2 percent with the Rock Island. Included were 822 road-haul cars delivered by Illinois Central to Pullman for switch delivery, and 604 cars delivered by Pullman to Illinois Central for road-haul movement upon which the Illinois Central would have absorbed an additional $11,223 in switching charges if the business were under Rock Island control and existing divisions between those two carriers were assessed. According to the Illinois Central, the natural flow of Pullman traffic is to the east and south, and that relatively little traffic originating or destined to industries thereon is interchanged with the Rock Island.

Statement of position.—The Illinois Central opposes granting of the application on the ground that it would not be in the public interest to permit the Rock Island to invade the Lake Calumet district by the expediency of buying Pullman. It contends that if control of Pullman is to pass to some other carrier, less conflict with the public interest would result by having such control rest in a belt

switching line. Irrespective of this view, however, the Illinois Central would not oppose the application if the acquisition of control by Rock Island is confined to that portion of Pullman situated north of a point in the vicinity of 124th Street. It requests that any authority granted herein be made subject to the condition that within 30 days of the date of the order, the Rock Island shall tender to the Illinois Central the option to acquire the line and land of Pullman south of 124th Street upon fair and reasonable terms subject to our approval. As a further alternative, the Illinois Central requests the imposition of conditions, in any order of approval, requiring the Rock Island to continue existing interchange arrangements with the Illinois Central, and to adhere to the present basis of divisions, or switching allowances, on traffic to and from industries on Pullman.

[fol. 5765]

NEW YORK CENTRAL SYSTEM

Location and extent of system.—The New York Central system comprises some 11,000 route miles of railroad lines serving 11 States and 2 Canadian Provinces. These States contain 50 percent of the nation's population, 64 percent of its manufacturing, and 60 percent of the coal mining. Terminals are New York, N. Y., and Boston, Mass., on the east, Ottawa and Montreal, Canada, and Mackinaw City, Mich., on the north, Chicago, Peoria, and St. Louis, Mo., on the west, and Cairo, Evansville, Ind., Louisville, Ky., Cincinnati, Ohio, Charleston, W. Va., and Connellsville, Pa., on the south. Many important cities in the States traversed are directly served. During the past 5 years the New York Central's extensive industrial department located 313 new and 72 expanded industries in the Chicago area. Between 1943-47, industries established on system rails numbered 2,482, in addition to 853 expansions. In 1947 the New York Central moved 4,065 carloads of coal to Chicago for transshipment via lake vessels, and was second only to the Illinois Central in respect to such traffic.

Intercorporate relationship.—Since February 1, 1930, the Michigan Central's owned and leased properties have been operated by the New York Central. Prior thereto, the latter controlled the former through ownership of capital stock. *New York Central Unification*, 150 I.C.C. 278, 285, and 154 I.C.C. 489. The Indiana Harbor Belt is owned 60 percent by the New York Central, and 20 percent each by the Chicago and North Western and Chicago, Milwaukee, St. Paul & Pacific Railroad Companies.

The New York Central, as the only eastern trunk line in the area, is interested in the development of the Lake Calumet district, and has spent considerable time and effort in trying to work out a feasible plan for such development with the city. The Indiana Harbor Belt has had trackage rights over the Michigan Central between Calumet Park, Ind. and Kensington since 1913. It has the right to interchange directly with Pullman at 116th Street but since before 1933 its interchanges with Pullman have been handled by the New York Central as agent. The Michigan Central owns a 66-foot right-of-way south of 126th Street extending from the tracks of Pullman to Doty Avenue.

Equipment, traffic, and industries served.—The Indiana Harbor Belt is 1 of the largest terminal switching carries in the Chicago area. It operates 124 miles of lines, substantially double track, in that switching district, owns 6 yards with a combined capacity of about 14,600 cars, 40 public team tracks capable of accommodating 456 cars, and directly serves some 515 diversified industries, many of which are classified heavy. It also owns 32 new Diesel-electric and 117 steam locomotives, and has 26 additional Diesels on order for 1949 delivery. Connections are made with all line-haul carriers within the Chicago switching district, and with the Chicago River & Indiana and the Chicago Junction, switching roads serving 653 industries. Many cross-town movements on the Indiana Harbor Belt are made on one-line rates. Line-haul traffic is handled on through billing, dispensing with the need for dealing with trunk lines.

A substantial portion of the traffic interchanged by the Indiana Harbor Belt with Pullman either originates or terminates on the former. In 1947, Pullman received 1,582 carloads which originated, and forwarded 517 carloads which terminated on the Indiana Harbor Belt. This traffic represented more than 10 per cent of all Pullman interchanges for that year. Over 20 per cent of all loads interchanged by Pullman in 1947 was interchanged with the New York Central and Indiana Harbor Belt.

Contentions.—The last-named interveners do not oppose the application, and they do not request that any conditions (other than those acceptable to the Rock Island) be imposed in the event the application is approved. If, however, we determine that the application should be granted subject to any conditions, of whatever nature, the New York Central and the Indiana Harbor Belt request that they be permitted to participate in the benefits of any and all such conditions equally with any other railroad. This position was reiterated by counsel for these interveners at the oral argument.

Chesapeake & Ohio

No direct evidence was submitted on behalf of this intervener. It is the position of the Chesapeake & Ohio, as set forth in its brief, that if we find that the proposed acquisi- [fol. 5766] tion by the Rock Island should be authorized, certain conditions with respect to the maintenance of existing through routes, joint rates, and switching arrangements should be imposed.

Conclusions

The proposed transactions do not contemplate a guaranty or assumption of payment of dividends, and the assumption of fixed charges and the increase in the applicant's total fixed charges resulting from the lease will not be inconsistent with or contrary to public interest.

Section 5 (b) of the act, in part, reads as follows:

> • • • If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: • • •

On the basis of this record, the applicant has sustained the burden of proof that its proposal to acquire control through stock ownership and lease of Pullman is consistent with the public interest and, therefore, it is entitled to an order authorizing such control. Affirmative action herein does not necessarily mean that one or more of the interveners would be precluded from establishing consistency with the public interest if a similar application in their behalf were pending before us. The fact remains that the Rock Island, by virtue of its contract with Pullman, is the only carrier in a position to submit an application at this time. Chicago Belt's declared intention to seek authority to control Pullman in the event the instant application is denied does not alter the situation. There is no indication that the Pullman interests would be willing to relinquish control of the railroad by a sale of its stock to Chicago Belt, and the latter's counsel, at the hearing, was not in a position to state whether funds were available even if the necessary arrangements for the purchase could be made.

It is conceded that, as a condition to approval herein, we may modify the terms and conditions proposed insofar as the public interest might require. This record does not warrant the conclusion that operation and development of the Pullman properties under the control of Chicago Belt would be superior, or as good, as that proposed by Rock Island. The vacant land has been in the hands of the present owners since 1880. Pullman has no industrial de-

partment, and except for an advertisement appearing in the Interstate Port Handbook, a publication of limited circulation, little or no efforts have been made to develop the property. It is expected that this situation will be remedied through the efforts of Rock Island's well organized and highly developed industrial department, and that adequate transportation service will be available to the industries now served by Pullman, or which may hereafter locate on property tributary to that carrier. The ability of Rock Island to take over control of Pullman from an operational standpoint is not questioned.

On the other hand, some doubt exists as to the feasibility of integrating Pullman's operations with those of Chicago Belt. It appears that the area in and around Chicago Belt's South Chicago yard is highly congested, and the situation at that yard was serious enough in 1948 to cause the formation of a committee made up of owner-line superintendents to investigate and recommend ways and means of relieving such congestion. The record shows that on July 8, and on three separate dates in August, 1948, Chicago Belt was unable to accept all the cars offered by the Rock Island for interchange at South Chicago. Other instances of this kind have occurred over a period of years. On two occasions the Rock Island dispatched locomotives from Blue Island to pick up cars of grain held by Chicago Belt but which that carrier could not handle in interchange for delivery to industries on the Rock Island. It is admitted that the necessity for such practice is very rare and occurs only during the time of heavy grain movements. In order to reach the Pullman line, Chicago Belt must operate over a portion of the Rock Island in what is referred to as a "saw" movement, which involves a back-up operation across certain tracks. Such movements are not uncommon in the Chicago terminal area, but in the case of a trip between Chicago Belt and Pullman would require 20 or 25 minutes. [fol. 5767] Nor does the record support the contention of Illinois Central that the Pullman property should be

divided and that this intervener should be tendered an option for the portion thereof south of 124th Street. The claim of Illinois Central in this regard is predicated upon prior occupancy of the territory involved and its willingness at all times to furnish rail service to any industry therein desiring it. As heretofore stated, the line of the Kensington & Eastern, upon which the Illinois Central must rely, was constructed much later than that of the Michigan Central, and all rail service to industries in the area has been performed exclusively by Pullman from about 1916.

Some of the interveners are apprehensive lest control by the Rock Island as proposed would destroy the neutrality heretofore exercised by Pullman in connection with the maintenance of through routes, joint rates, and switching arrangements presently existing. The record warrants the conclusion that such neutrality should be maintained, and in order to protect the situation, the transaction herein authorized will be subject to the following conditions:

1. The present neutrality of handling traffic in-bound and out-bound by Pullman Railroad Company shall be continued so as to permit equal opportunity for service to and from all lines reaching the rails of Pullman Railroad Company without discrimination as to routing or movement of traffic and without discrimination in the arrangement of schedules or otherwise.

2. The present traffic and operating relationships existing between Pullman Railroad Company and all lines connecting with its tracks shall be continued, including present points of interchange, insofar as such matters are within the control of the applicant, subject to such changes as may be agreed upon by the carriers involved, or as we may order in appropriate proceedings.

3. Pullman Railroad Company shall accept, handle, and deliver all cars in-bound and out-bound loaded and empty, without discrimination in promptness or frequency of ser-

vice as between cars destined to or received from competing carriers and irrespective of destination or route of movement.

4. Any party or any person having an interest in the subject matter may at any future time make application for such modification of the above conditions, or any of them, as may be required in the public interest, and jurisdiction will be retained to reopen the proceeding on our own motion for the same purpose.

We are of the opinion that no condition should be imposed requiring the applicant to continue in effect as its divisions of rates the existing divisions which accrue to the Pullman. Divisions primarily are matters for settlement between the carriers by negotiation. If the parties cannot agree, they have the right to file a complaint under appropriate provisions of the act.

FINDINGS

Subject to the foregoing conditions, and the further condition for the protection of employees mentioned heretofore, we find that acquisition of control by the Chicago, Rock Island and Pacific Railroad Company of the Pullman Railroad Company, through purchase of capital stock, and lease by the former of the railroad property of the latter, are transactions within the scope of section 5 (2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that said transactions will be consistent with the public interest.

An appropriate order will be entered, effective 30 days from its date.

COMMISSIONER MILLER was necessarily absent and did not participate in the disposition of this case.

[fol. 5768] ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 17th day of November, A.D. 1949.

Finance Docket No. 16252

PULLMAN RAILROAD COMPANY CONTROL, ETC.

Investigation of the matters and things involved in this proceeding having been made, hearings having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof.

It is ordered, That, subject to the conditions set forth in said report, acquisition by the Chicago, Rock Island and Pacific Railroad Company of control of the Pullman Railroad Company through purchase of capital stock, and lease by the former of the railroad property of the latter, upon the terms and conditions in said report found just and reasonable, be, and they are hereby, approved and authorized.

It is further ordered, That the Chicago, Rock Island and Pacific Railroad Company, when filing schedules establishing rates, fares, and charges applicable to the line of railroad herein involved, shall refer to this order by title, date, and docket number.

And it is further ordered, That this order shall become effective 30 days from its date.

By the Commission, division 4.

W. P. BARTEL
Secretary

(SEAL)

[fol. 6096]

CLERK'S NOTE

8/5/65

I am not able to produce the order described in designation 168.*

C. B. Watkins, Clerk, Wm. M. Johnson, Deputy Clerk.

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(167) The entire certified record of proceedings before the Interstate Commerce Commission in its Finance Docket Numbers 19448, 19538, 19742 and 19921, *Illinois Central Railroad Company, et al.—Construction and Trackage Rights—Lake Calumet Harbor, Cook County, Illinois,* including the transcript and all exhibits, reports and orders therein, which were introduced and admitted in evidence in the trial of and oral argument in this cause.

*(168) Order of the Court receiving the above-described certified record in evidence.

[fol. 6097] [File endorsement omitted]

[fol. 6098]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT—Filed April 4, 1960

(Equitable Relief Sought)

I.

The plaintiff, The New York, Chicago and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate"), brings this complaint against the United States of America and Interstate Commerce Commission for the purpose of suspending, enjoining, setting aside, and annulling the report, order and certificate of the Interstate Commerce Commission (hereinafter referred to as "the Commission"), dated October 5, 1959, the corrected certificate and order dated October 5, 1959, and the order of said Commission dated March 22, 1960 (issued March 25, 1960) denying reconsideration and reargument in proceedings entitled Finance Docket No. 19538—ILLINOIS CENTRAL RAILROAD COMPANY ET AL.—CONSTRUCTION AND TRACKAGE RIGHTS—LAKE CALUMET HARBOR, COOK COUNTY, ILL., Finance Docket No. 19448—MICHIGAN CENTRAL RAILROAD COMPANY ET AL., CONSTRUCTION, ETC., Finance Docket No. 19742—BELT RAIL-

WAY COMPANY OF CHICAGO TRACKAGE RIGHTS, ETC., and Finance Docket No. 19921—MICHIGAN CENTRAL RAILROAD COMPANY ET AL., TRACKAGE RIGHTS. The report, order and [fol. 6099] certificate of the Commission, together with the corrected certificate are attached hereto as Appendices A and B, respectively; the order of March 22, 1960 is attached hereto as Appendix C.

II.

Plaintiff, Nickel Plate, is a consolidated corporation organized and existing under the laws of the states of New York, Pennsylvania, Ohio, Indiana and Illinois, with its principal office and place of business at the Terminal Tower Building, Cleveland, Ohio, mailing address P. O. Box 6119, Cleveland 1, Ohio; it is a common carrier engaged in the transportation of property and passengers in interstate and intrastate commerce operating in the states of its incorporation as well as Missouri.

III.

This action arises, the United States of America is made a defendant herein, and the jurisdiction of this court is conferred by U.S.C., Title 28, Sections 1336, 2284, 2321, 2322, 2323, 2324 and 2325, as hereinafter more fully appears. The venue is laid in the Northern District of Ohio, Eastern Division, pursuant to U.S.C., Title 28, Section 1398.

IV.

The Interstate Commerce Commission is an administrative tribunal, created by the Act to Regulate Commerce approved February 4, 1887, 24 Stat. 383, and amendments thereto, now known as the Interstate Commerce Act, with specifically vested powers and duties respecting interstate commerce under said Interstate Commerce Act and the various acts amendatory thereof and supplemental thereto.

V.

The proceedings before the Commission involved the efforts of six operating railroads subject to the provisions of Part I of the Interstate Commerce Act (49 U.S.C. §1, et seq.) [fol. 6100] to obtain authorization to construct a line of railroad to Lake Calumet, Chicago, Illinois and to operate by trackage rights over existing lines of railroad to reach such construction. Lake Calumet is an inland lake connected with Lake Michigan by means of the Calumet River, portions of which lake area have been developed as an inland port by the Chicago Regional Port District. The Chicago Regional Port District is a political subdivision, body politic and municipal corporation created by act of the Legislature of the State of Illinois, approved June 1, 1951 (1957 Ill. Rev. Statute, Chapter 19 § 152-154). The line of railroad of the Nickel Plate is located adjacent to the east and north sides of said Lake Calumet, and the lines of the Chicago, Rock Island and Pacific Railroad Company (Rock Island) and the Pullman Railroad Company (Pullman) are located on the northwest and southwest sides of said Lake Calumet. The line of Pullman is leased to and operated by Rock Island. Applicants' ultimate purpose is to reach and serve Lake Calumet to obtain freight traffic which otherwise would be transported by Nickel Plate and Rock Island.

VI.

By application filed October 22, 1956 in Finance Docket No. 19538 the Kensington & Eastern Railroad Company (a non-operating railroad), the Illinois Central Railroad Company, The Philadelphia, Baltimore and Washington Railroad Company (a non-operating railroad), and the Pennsylvania Railroad Company applied under Section 1(18) of the Interstate Commerce Act (49 U.S.C. §1(18)) for authority to construct and operate portions of a line of railroad extending from existing tracks owned by said Kensington & Eastern Railroad to the entrance of property

owned by said Chicago Regional Port District, which property is hereinafter referred to as the Port District. Said line of railroad to be constructed would be approximately 1.43 miles in length, of which 0.549 of a mile would be constructed by Kensington & Eastern Railroad, 0.119 of a mile would be constructed by Illinois Central, and 0.763 of a mile would be constructed by the Pennsylvania Railroad in behalf of The Philadelphia, Baltimore & Washington Railroad Company. The stock of the Kensington & Eastern [fol. 6101] is owned by said Illinois Central, but the line of the Kensington & Eastern is leased to the Chicago, South Shore and South Bend Railroad Company.

In the same application under Section 5(2) of the Interstate Commerce Act (49 U.S.C. §5(2)) Pennsylvania sought authority for the acquisition of trackage rights over existing lines of railroad of the Illinois Central to reach the Kensington & Eastern, Illinois Central and Pennsylvania Railroads sought to acquire trackage rights over the Kensington & Eastern, and Illinois Central, Pennsylvania, and the Chicago, South Shore and South Bend sought trackage rights over the portions of said new line to be constructed which each did not own.

By application filed April 25, 1957 in Finance Docket No. 19742 The Belt Railway of Chicago requested authority under Section 5(2) of the Interstate Commerce Act (49 U.S.C. §5(2)) to acquire trackage rights over tracks owned, operated, or to be constructed by Illinois Central, Kensington & Eastern, and Pennsylvania Railroads up to the entrance to the Port District.

By application filed September 9, 1957 in Finance Docket No. 19921 The Michigan Central Railroad Company, The New York Central Railroad, and Indiana Harbor Belt Railroad applied for authority under Section 5(2) of the Interstate Commerce Act (49 U.S.C. §5(2)) to acquire trackage rights on behalf of the New York Central and Indiana Harbor Belt Railroads over the lines of railroad owned, operated or to be constructed by Illinois Central, Kensing-

ton & Eastern, Chicago, South Shore & South Bend and Pennsylvania Railroads up to the entrance to the Port District.

Another application in Finance Docket No. 19448 had been filed by said Michigan Central, New York Central and Indiana Harbor Belt for authority to construct and operate a track to the Port District; said application was ordered dismissed by the Commission in its said order of October 5, 1959.

[fol. 6102] The plaintiff, Nickel Plate, was authorized to intervene in the proceedings before the Interstate Commerce Commission by orders dated January 16, January 17, May 20, and September 18, 1957, copies of which orders are attached hereto and made a part hereof as Appendices D-G, inclusive. Rock Island and Pullman were also authorized to intervene in said proceedings before the Commission. Nickel Plate, Rock Island, and Pullman all opposed the applications before the Interstate Commerce Commission.

VII.

The hearings on said applications were held in Chicago, Illinois from September 30 through October 11, 1957. Following the hearings briefs were filed with the Examiner who issued a proposed report recommending granting of the applications as well as authorizing the applicants to operate within and serve the Chicago Regional Port District. Exceptions to the proposed report of the Examiner were filed by Nickel Plate on February 10, 1958, as well as by Rock Island and Pullman. Oral argument was held before the Interstate Commerce Commission on April 2, 1959. On October 5, 1959 the Commission issued its report, order, and certificate approving the applications in Finance Dockets 19538, 19742 and 19921 for trackage rights and construction and operation up to the Port District but not authorizing operations within the Port District. Nickel Plate filed a petition for reconsideration of said report, order and cer-

tificate and for reargument, which petition was denied by the Commission by order dated March 22, 1960, issued March 25, 1960.

VIII.

The record before the Commission in said proceedings establishes by substantial evidence that:

Lake Calumet is an inland lake in the City of Chicago, Illinois, connected with Lake Michigan by the Calumet River which enters Lake Calumet at its southeast corner. The bulk of the property abutting on said lake is owned by the Chicago Regional Port Dis- [fol. 6103] trict; that portion of property abutting on the south side of the lake next to the Calumet River was purchased by the Pennsylvania Railroad shortly before these proceedings commenced and is occupied by an industry known as Calumet Harbor Terminals, Inc. The only portion of Chicago Regional Port District property which has been developed for industrial purposes consists of two transit warehouses, a back-up warehouse, and two grain elevators on the south and southwest sides of Lake Calumet. Each of said warehouses and elevators has been leased to and is operated by private industrial operations, the Chicago Regional Port District being solely a developer and not a warehouser or shipper.

All railroad service to industries now located at Lake Calumet, both on and off Port District property, is performed by Rock Island, which railroad has rendered and is rendering adequate and complete rail service to such industries. Rock Island is able to provide rail service when and as needed in the future on the south, west, and northwest sides of said lake. Nickel Plate is ideally situated to serve the eastern and northeastern sides of said lake when and as developed for industrial purposes and is well able to provide adequate and complete rail service to such areas. There is no need to admit additional railroads to render service beyond

that which Nickel Plate and Rock Island have provided or can provide at any time now or in the future.

The announced plan of the applicants to render service to any and all portions of Lake Calumet now or hereafter developed, including the east side of Lake Calumet where Nickel Plate is located, would if accomplished deprive Nickel Plate and Rock Island of freight traffic which they are fully capable of handling and which they have held themselves out to handle for years prior to the recent development of the St. Lawrence Seaway.

[fol. 6104] The operating plan by which the applicants would serve Lake Calumet is unworkable, would cause congestion, would create safety hazards, would not fulfill needs of any industry on Lake Calumet and would in fact prevent the rendition of adequate rail service to and from such industries.

For the reasons above stated, as well as for others hereinafter set forth, Nickel Plate, Rock Island and Pullman sought outright denial of the various applications.

IX.

The Commission's report, certificate, and orders are arbitrary, in abuse of discretion, not in accordance with law, contrary to constitutional right, in excess of statutory jurisdiction and authority, not in observance of procedure required by law, and unsupported by substantial evidence in the following respects and for the following reasons among others:

1. The Commission erroneously decided and prematurely issued its report, certificate and order of October 5, 1959 (as later corrected) and its order of March 22, 1960 because it did not have before it for consideration and decision all applications required to effect the entire plan of the applicants to serve Lake Calumet. The Commission ear-

marked its own error and set forth the prerequisites and material issues for a decision in the proceedings before it by stating in its report of October 5, 1959 (Sheet 5):

> "Orderly procedure dictates that all applications required to effect the entire plan be heard simultaneously, particularly, as here, where the evidence to be presented in support of the construction and trackage rights is identical."

Specifically, applicants' entire plan, first disclosed at the hearings, included construction and operation up to Lake Calumet, and joint acquisition and operation of tracks within the Port District. Their applications, however, covered only construction and operation up to the Port [fol. 6105] District, and not the proposed joint acquisition and operation within the Port District, for which joint acquisition and operation additional applications were required, as the Commission found in the following statements:

> "The Nickel Plate states that the applicants have failed to file appropriate applications for authority, so that even if the pending applications should be approved, contrary to established principles of proof, the applicants would still not be authorized to operate within the Port District. We are of the opinion that the Nickel Plate's contention in this regard is meritorious, and nothing herein is to be construed as authority to the applicants to operate over the tracks owned by, and located within, the Port District." (Sheet 8)

> "We are of the opinion that operation by the applicants into the Port District, as proposed, constitutes an extension of a line of railroad requiring our prior approval, and is not merely an industrial spur contemplated by the exemption contained in section 1(22) of the act." (Sheet 47)

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* Sheet references are to the report of October 5, 1959.

By the Commission's own statements, therefore, orderly procedure was not followed in these proceedings because the Commission did not have the additional required applications before it for decision.

2. By receiving evidence and making findings on that portion of applicants' plan relating to the joint acquisition and operation of tracks within the Port District and by using those findings to authorize the construction and operation up to the Port District without having applications covering said joint acquisition and operation within the Port District, the Commission prejudged applications which the Commission stated were required to be filed, but were not filed, in order to effect the entire plan.

3. The Commission erred in receiving and considering evidence on the joint acquisition and operation of tracks within the Port District and in relying on findings as to such evidence, all over Nickel Plate's timely objections, as the basis for approving the applications for authority to construct and operate up to the Port District.

(a) If issues as to operations within the Port District were material to disposition of the applications before the Commission, that is, had to be decided in order to [fol. 6106] approve such applications, Nickel Plate was deprived of its constitutional right to prior notice of such issues in the proceeding, contrary to due process under the Fifth Amendment to the Constitution of the United States of America and Sections 5(a) and 8(b) of the Administrative Procedure Act (5 U.S.C. §§1004 (a) and 1007(b)). The plan for joint acquisition and operation of tracks within the Port District was disclosed only after the hearings had commenced, without any indication in the applications or otherwise prior to the hearings that such plan was contemplated.

(b) If issues as to operations within the Port District were immaterial to disposition of the applications before the Commission, that is, did not have to be

decided in order to approve such applications, the receipt of evidence and the reliance on findings as to such issues as the basis for approving the instant applications was in error, contrary to Section 8(b) of the Administrative Procedure Act (5 U.S.C. §1007(b)).

4. The Commission erred in finding that the joint acquisition and operation of tracks within the Port District were needed and would be practical and economical because it did not have applications before it to authorize such joint acquisition and operation and because such findings were based on evidence which would have been insufficient for such findings even if applications had been filed for such authority. The applicants did not produce evidence which fulfilled the Commission's published rules in respect of applications for authority to acquire and operate extensions of lines of railroad.

5. The Commission contrary to law approved the applications of the New York Central, Indiana Harbor Belt, The Belt Railway of Chicago and the Chicago, South Shore & South Bend Railroads, filed under Section 5(2) of the Interstate Commerce Act (49 U.S.C. §5(2)) for authority to [fol. 6107] operate over the line to be constructed up to the Chicago Regional Port District, since the Commission does not have jurisdiction under Section 5(2) to authorize the acquisition of trackage rights over non-existent tracks. Trackage rights may be authorized under Section 5(2) only over tracks "owned or operated" (hence, existing) by another carrier.

6. The Commission departed from, and applicants failed to produce evidence fulfilling, standards of proof properly applicable under Section 1(18) and Section 5(2) of the Interstate Commerce Act (49 U.S.C. §1(18) and §5(2)):

(a) The Commission established a new and lesser standard of proof for applications for railroad construction and operation to facilities owned by public bodies than to facilities owned by private industries.

7. The Commission erred in finding that the proposed lease of tracks and joint operating arrangement within the Port would be feasible and practical, subject to conditions as to certain terms, inasmuch as (1) the full text of said lease was not introduced in evidence, (2) no party had seen the full text of said lease, (3) no party had agreed to said lease, and (4) the joint operating arrangement within the Port District could not become effective without the right to occupy said tracks by lease.

8. The Commission erred in imposing a condition on the terms of the proposed lease between the Chicago Regional Port District and the applicants, which lease had not been submitted to it for approval and which it could not approve in the absence of an application. Such imposition of condition constituted a prejudgment of applications which were required to be filed before such a lease acquisition could become effective.

(a) Since such condition would require Nickel Plate to obtain Commission authorization to operate in the area adjacent to its line of railroad, which authorization is not required under statutory law (49 U.S.C. [fol. 6108] §§1(18) and 5(2)), the Commission erred in extending the jurisdiction conferred on it by statute.

9. The Commission received evidence immaterial to the applications before it, made findings on such evidence, and relied on such findings to approve the applications before it, such evidence consisting of the proposed lease of tracks within the Port District, the joint plan of operations within the Port District, the alleged volume of the traffic to industries within the Port District, and the alleged needs of such industries, all such evidence being immaterial because approval of the applications before the Commission would not entitle the applicants to operate within the Port District.

10. The Commission erred in finding that approval of the applications before it would result in greater rail competi-

tion, better service, greater car supply, and lower rates for the industries on Port District property at Lake Calumet harbor, because approval of the applications before the Commission would not entitle the applicants to operate within the Port District.

11. The applications were granted without proof that existing and future service by Rock Island, Pullman and Nickel Plate is or would be inadequate.

(a) The Commission erred in approving the applications after finding that Rock Island is prepared to furnish such additional service as may be required in the area.

(b) The Commission erred in approving the applications after finding that "Without doubt, the Nickel Plate is ideally situated to provide service to the northern and eastern sides of the lake." (Sheet 13)

12. The Commission erred in approving the joint construction and operation up to the Port District since no need was shown for such additional service by Calumet Harbor Terminals, Inc., and since the applicants did not introduce evidence as to their right to occupy the land on which portions of said track to be constructed would be located.

[fol. 6109] 13. The Commission erred in authorizing construction and operation to Calumet Harbor Terminals, Inc., by the applicants in view of its findings that Rock Island has cooperated extensively in developing said terminals as a rail-water terminal.

14. The Commission erred in finding that the estimated increase in traffic at Lake Calumet creates a need for applicants' proposed service. This finding is based in part on erroneous sub-findings that the St. Lawrence Seaway would be completed with a draft of 27 feet made available all the way from Montreal into the principal Great Lakes ports in 1959.

15. The Commission erred in making findings as to the volume of traffic to be handled on the east side of Lake Calumet and in finding a need for additional rail service on the east side of said lake.

16. The Commission erred in finding that the method proposed by the applicants to reach and serve the port is economical as well as practical.

17. The Commission erred in finding that the movements over applicants' proposed route into the port will not involve occupation of the South Shore tracks for a longer period of time than at present, inasmuch as there is no traffic moving over said South Shore tracks to the port today and such proposed route does not exist today.

18. The Commission erred in failing to find that the applicants' proposed plan of service, both to Calumet Harbor Terminals, Inc., outside of the Port District and to industries within the Port District, would be unworkable and unsafe and would prevent the performance of adequate transportation service to any and all of said industries.

X.

Plaintiff will be irreparably damaged if said report and order are not permanently suspended, enjoined, set aside and annulled, and is without adequate remedy at law.

XI.

Wherefore, plaintiff prays:

(1) That process may issue against the United States of [fol. 6110] America and Interstate Commerce Commission;

(2) That a court constituted as required by U.S.C. Title 28, Sections 2284, and 2321-2325, consisting of three judges, of whom at least one shall be a circuit judge, be convened, and that said court so constituted and convened shall hear this petition upon due and legal notice to defendants;

(3) That said court, upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside, and annulling the said report, certificate and orders of the Commission, and permanently enjoining the Commission from approving said applications;

(4) That plaintiff have and recover of the defendants the proper costs of this suit; and

(5) That the plaintiff have such other and further relief in the premises as to equity may appertain and as may be deemed by this court fit and proper.

Respectfully submitted,

Thomas O. Broker, Attorney for Plaintiff, 3016 Terminal Tower, P. O. Box 6119, Cleveland 1, Ohio.

Dated: April 4, 1960

[fol. 6176]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Interveners

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, and PULLMAN RAILROAD COMPANY, a Corporation, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY—April 7, 1960

1. Intervening plaintiffs, Chicago, Rock Island and Pacific Railroad Company (Rock Island) and Pullman Railroad Company (Pullman), (hereinafter designated jointly as "Rock Island-Pullman") bring this suit to enjoin, annual, suspend and set aside the report, order and certificate of the Interstate Commerce Commission issued on October 5, 1959 (Petition for Reconsideration denied March 22, 1960) in proceedings entitled, "Finance Docket No. 19538, Illinois Central Railroad Company, et al.—Con-

struction and Trackage Rights—Lake Calumet Harbor, Cook County, Illinois; Finance Docket No. 19448, Michigan Central Railroad Company, et al. Construction, etc.; Finance Docket No. 19742, Belt Railway Company of Chicago Trackage Rights, etc.; and Finance Docket No. 19921, Michigan Central Railroad Company, et al., Trackage Rights." The report, orders and certificates of the Commission in said proceedings are attached to the Complaint [fol. 6177] of the New York, Chicago and St. Louis Railroad Company (Nickel Plate) as Appendices A, B and C and are adopted by reference by Rock Island-Pullman as if set forth herein in full.

2. Rock Island is a corporation organized and existing under and by virtue of the laws of the State of Delaware and is a common carrier by railroad subject to the provisions of Part I of the Interstate Commerce Act (Title 49, U.S.C., Sec. 1, et seq.) and is engaged in the transportation of property and passengers in foreign, interstate and intrastate commerce. Pullman is a corporation organized and existing under and by virtue of the laws of the State of Illinois, and is a common carrier by railroad subject to the provisions of Part I of the Interstate Commerce Act (Title 49, U.S.C., Sec. 1, et seq.) and is engaged in the transportation of property and passengers in foreign, interstate and intrastate commerce. Pullman is controlled through stock ownership and leased to and operated as a part of Rock Island.

3. Jurisdiction of this Court over this action is provided by Title 28, U.S.C., Secs. 1336, 2284, and 2321-2325 inclusive, which, among other things, authorize suits to be brought in the United States District Courts against the United States of America to suspend, enjoin, annul or set aside orders of the Interstate Commerce Commission (hereinafter designated as the "Commission"). Venue of this action is in this Court pursuant to Title 28, U.S.C., Section 1398, because of the fact that the principal office of Nickel Plate is in Cleveland, Ohio.

4. The proceedings before the Interstate Commerce Commission involved the efforts of six operating railroads, hereinafter named, subject to the provisions of Part I of the Interstate Commerce Act (Title 49, U.S.C. Sec. 1, et seq.) to construct a line of railroad to Lake Calumet Harbor Port in Chicago, Illinois, one of the segments of the Port of Chicago located on Lake Calumet, an extremely shallow inland lake located six miles from Lake Michigan.

Attached hereto and marked Exhibit A is a map, based on maps and plats, Exhibits H-4, H-15 and H-16 in the record, showing the lake and the area surrounding it and the location of the railroads owned by the parties to the proceeding before the Commission.

[fol. 6178] Lake Calumet and some adjoining property are owned by the Chicago Regional Port District (hereinafter designated as "Port District"), a political subdivision, body politic and municipal corporation, created by Act of the Legislature of the State of Illinois, approved June 1, 1951 (1959 Ill. Rev. Statutes, Chapter 19, Secs. 152, 154). The Port District has continuing power to borrow money through the issuance of revenue bonds for the purpose of dredging channels, creating land in the lake and acquiring, constructing, reconstructing, extending or improving warehouses, terminals, terminal facilities and port facilities, but has no power to levy taxes. Facilities created by the Port District are not operated by said Port District but each facility in itself is a separate entity leased to private operators. It can also lease land to private operators for development by them. In furtherance of the powers granted pursuant to law, the Port District issued and sold $24,000,000 in Revenue Bonds. All such bonds are payable solely from the revenues or income to be derived from the Port facilities. The proceeds from the bonds have been used to construct two grain elevators, three transit sheds, a back-up warehouse, and some railroad track. Transit shed No. 1 is leased to the North Pier Terminal Company; Transit shed No. 2 is leased to Packers

Terminal and Warehousing Company; and shed No. 3 has been leased to the Calumet Harbor Terminals, Inc. The back-up warehouse has been leased to North Pier Terminal and Calumet Harbor Terminals, Inc. Elevator No. 1 is leased to the Illinois Grain Company. Elevator No. 2 has been leased to the Rice Powell organization. Approximately 10 percent of the Lake Calumet Harbor Port is presently developed, which is that portion of the Port located on the south and southwest sides as shown on Exhibit A. Lake Calumet itself extends from about 106th Street on the north to 130th Street on the south, a distance of 2.2 miles.

Rock Island-Pullman serves the southwest side of the Port exclusively and has the only track near the whole of the west and south sides of the lake. Nickel Plate is located adjacent to the east side of the lake.

5. Pullman interests were the pioneers in the Lake Calumet area. Pullman aided in the development of the Harbor. The applicants paid no attention to the whole area until [fol. 6179] it looked as though the Port might be developed. Tracks were laid by the Pullman interests, predecessor of the Pullman Railroad Company, along the west side of the lake, between 94th Street and 126th Street in Chicago, Illinois, immediately after the right of way was acquired in 1880. In 1912 the track was extended to 129th Street. In 1915 Pullman extended this particular track that reached 129th Street, laying it directly north of 130th Street east to the Calumet River. The Pullman interests acquired some 4,000 acres of land between 87th Street and 136th Street between the years 1877 and 1880, most of which was sold to industries and railroads. The present right of way of the Kensington and Eastern Railroad (K&E) from 115th Street to 130th Street and the Calumet River was sold by the Pullman interests to the K&E, a subsidiary of the Illinois Central, in 1907. Part of the tracks on this right of way will be used to reach the Port.

The tracks and right of way of Pullman have been at all time adjacent to Lake Calumet and between the lake and

the lines of all other railroads located to the west and south of Lake Calumet. Service to all of the industries in the area between 95th Street on the north, 130th Street on the south, Lake Calumet on the east and the Illinois Central tracks on the west has been performed exclusively by Rock Island-Pullman since 1880, with the exception of service to two icehouses served by the Michigan Central until 1915 when it ceased serving these industries.

In 1908 the Pullman interests dedicated some 10 to 15 acres of land to the United States, without expense to the government, to be used as a turning basin for navigation. This is what is known as Turning Basin No. 5 at the inlet to Lake Calumet. This reduced Pullman's water frontage by 1000 to 1500 feet.

Originally the riparian rights of Pullman interests in Lake Calumet extended along the entire west and south shores of the lake. In 1917 Pullman interests, pursuant to agreement with the City of Chicago and for the purpose of harbor development, waived its riparian rights to some four miles of lake frontage without the payment of any compensation. Pullman interests dedicated 10 streets leading to Lake Calumet Harbor at about the same time, all without any expense to the City of Chicago. In 1935 Pullman interests conveyed additional property to the United [fol. 6180] States for the widening of the Calumet River immediately north of 130th Street without expense to the government. The foregoing are some of the things the Pullman interests have done to make the Lake Calumet port possible.

In 1950 Rock Island purchased the capital stock of Pullman from the Pullman interests and leased Pullman properties incorporating it as a part of the Rock Island system. This was done after approval of the transaction by the Interstate Commerce Commission.

By reason of such purchase the Rock Island succeeded to all rights, privileges, priorities and equities of Pullman.

Before Rock Island purchased Pullman it assured itself that Calumet Harbor Terminals, Inc. would purchase and

use the industrial property located at the southeast corner of the lake and served by Pullman and was instrumental in securing the location of this industry.

Rock Island-Pullman has an entrance to the Port District by means of an overhead bridge at about 127th Street. It also has an entrance to the Port District at 107th Street by means of an overhead bridge and is prepared to relocate and reconstruct this bridge as required by traffic conditions.

6. By application filed October 22, 1956 in Finance Docket No. 19538 the K&E; the Illinois Central Railroad Company (Illinois Central); the Philadelphia, Baltimore and Washington Railroad Company (PB&W), a non-operating subsidiary of the Pennsylvania; and the Pennsylvania Railroad Company (Pennsylvania), applied under Section 1(18) of the Interstate Commerce Act (49 U.S.C. 1(18)) for authority to construct a line of railroad leading to Lake Calumet Harbor Port. The proposed track would be approximately 1.431 miles in length with the initial segment of 2900 feet, or 0.549 mile, to be constructed by the K&E; the next 630 feet, or 0.119 mile to be constructed by the Illinois Central; and the final 4030 feet, or 0.763 mile, to be constructed by the Pennsylvania on behalf of the PB&W. The track would lead out from the westbound main line of the K&E at a point south of Lake Calumet and then extend east and north to a connection with the proposed track of Pennsylvania. The connection between the Illinois Central and Pennsylvania segments would be made at about 130th Street, and the Pennsylvania track, [fol. 6181] in turn, would connect with a Lake Calumet Harbor Port track.

In the same application Illinois Central, Pennsylvania and Chicago, South Shore and South Bend Railroad (South Shore) sought authority under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)) for the acquisition of trackage rights over the line to be constructed and certain existing tracks over which it is necessary to operate

in order to reach the Lake Calumet Harbor Port. The railroad properties of the K&E are leased to and operated by South Shore.

By application filed April 25, 1957 in Finance Docket 19742 the Belt Railway Company of Chicago (Chicago Belt) requested authority under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)) to acquire trackage rights over the Illinois Central, K&E, South Shore and Pennsylvania from a point on its line at or near 95th Street to a point on the railroad tracks of the Port District on the west side of Lake Calumet Harbor near 130th Street.

By application filed September 9, 1957 in Finance Docket 19921 the Michigan Central Railroad Company (Michigan Central), the New York Central Railroad Company (New York Central), and the Indiana Harbor Belt Railroad Company (I.H.B.) applied for authority under Section 5(2) of the Interstate Commerce Act (49 U.S.C. 5(2)) to acquire trackage rights on behalf of the New York Central and Indiana Harbor over the lines of railroad owned or operated by the Illinois Central, K&E, South Shore and Pennsylvania leading to Lake Calumet Harbor Port. (Prior to the filing of the applications listed above by the Chicago Belt and Michigan Central, New York Central and I.H.B., each of them had filed separate applications to construct railroad tracks leading to Lake Calumet (Belt application No. 19391; Michigan Central, New York Central and I.H.B. application No. 19448). These applications were resisted by some of the other applicants on the ground that the latter contemplated serving the Port District alone. The Belt Railway construction application was later dismissed coincident with the filing of its trackage application, while the Michigan Central, New York Central and I.H.B. construction application was ordered dismissed by the Commission in its order of October 5, 1959.)

[fol. 6182] Rock Island-Pullman and Nickel Plate intervened in opposition to the granting of each of the applications and participated fully in the proceeding, all as shown

in the report and order of the Commission. Rock Island-Pullman opposed the applications on the grounds, among others, that they are serving and will continue to serve adequately the Chicago Regional Port District; that they propose and are prepared to expend further sums of money to keep themselves in a position to serve said Chicago Regional Port District adequately; that they are capable of performing adequate service in the future to meet the rail transportation needs of the Chicago Regional Port District; that they are entitled to retain the rail traffic of the Chicago Regional Port District; that there is no reason sufficient in law for applicant's extension of their lines of railroad and operations to serve territory heretofore served exclusively and adequately by petitioners; that the expenditures of sums of money required to be spent by applicants to serve said Chicago Regional Port District cannot be justified either in fact or in law; and that applicant's extension of their line of railroad and operations to serve territory heretofore served exclusively and adequately by petitioners cannot be supported by public convenience and necessity, could mean only a duplication of rail facilities, and would create unsound and uneconomic conditions in transportation.

A joint hearing on the applications was held at Chicago. Following the hearings briefs were filed with the examiner who issued a proposed report and order recommending granting of the applications. Exceptions to the proposed report of the examiner were filed by Rock Island-Pullman, and parties supporting the applications filed replies to the exceptions. Oral argument was held before the full Commission. On October 5, 1959 the Commission issued its report and order approving the applications in Docket Nos. 19538, 19742 and 19921. Rock Island-Pullman filed Petitions for Reconsideration which were denied by the Commission on March 22, 1960.

7. The applicable parts of the Interstate Commerce Act are set forth as follows:

Section 1(18) (49 U.S.C. 1(18)) reads in part:

[fol. 6183] "After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, * * *"

Section 1(19) (49 U.S.C. 1(19)) reads in part:

"The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this part shall apply to all such proceedings."

Section 5(2)(a) and (b) (49 U.S.C. 5(2)) provide in part:

"(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

* * * * * * *

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

* * * * * * *

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to

the Commission, * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transactions, upon the terms and conditions, and with the modifications, so found to be just and reasonable * * *."

8. The report and order of October 5, 1959 and the order of March 22, 1960 in Finance Docket Nos. 19538, 19742 and 19921 are erroneous, are not supported by and are contrary to substantial evidence, exceed the statutory authority of the Commission, constitute an abuse of discretion, and are unlawful, arbitrary, capricious, null and void for the reasons hereinafter alleged.

A

The Commission in granting the applications was guided by a misinterpretation of national policy, contravened the legislative intent and purpose of Section 1(18) and Section [fol. 6184] 5(2)(a) and (b) of the Interstate Commerce Act (49 U.S.C. 1(18), 5(2)(a) and (b)), contravened the National Transportation Policy (49 U.S.C. preceding Part I of the Interstate Commerce Act), misapplied the law, ignored judicial and Commission precedent, and applied an improper legal yardstick as to public convenience and necessity in the following respects:

(1) The applications were granted without proof of a strong or urgent need for the service and without proof that no reasonably adequate service exists or can be provided as needed by the carrier in the field, which is the test laid down by the statute, by the courts and by the Commission in its decisions.

(2) The applications were granted without proof that the existing service of Rock Island-Pullman was

inadequate or would be inadequate in the reasonably foreseeable future; and, in fact, was granted in face of a finding that Rock Island-Pullman is prepared to furnish such additional service as may be required in the area.

(3) The applications were granted, not upon a factual premise for need for the proposed service within the reasonably foreseeable future, but upon conjecture, surmise and speculation as to the far distant future completely devoid of factual premise.

(4) The authorization granted to applicants to construct tracks and extend their service to the southwest side of Lake Calumet Harbor Port, an area now served adequately by Rock Island-Pullman alone and which will continue to be served adequately, efficiently and economically by Rock Island-Pullman, will result in a wasteful duplication of rail facilities and will create unsound and uneconomic conditions in transportation, all contrary to the National Transportation Policy and the intent and purpose of Congress in enacting Section 1(18) and Section 5(2)(a) and (b).

(5) The proposed operations will be improvident and financially unsound and will result in uneconomic conditions in transportation contrary to the National Transportation Policy and the intent and purpose of [fol. 6185] Congress in enacting Section 1(18) and Section 5(2)(a) and (b).

(6) The applications were granted on the ground that publicly owned facilities and not private facilities are involved; thus the Commission created a new standard of convenience and necessity not provided in Sections 1(18) and 5(2) in deciding the issues in the proceedings.

(7) In granting the applications the Commission misinterpreted Congressional policy in concluding that

approval of the applications should be given because competition would result. This use of the word "competition" in a sterile sense is contrary to the purpose of Section 1(18) since its purpose is to prohibit unbridled competition.

(8) The Commission based its decision upon its statement that Lake Calumet Harbor Port is open to all trucking companies, barge lines and steamship lines, while Rock Island-Pullman is the only railroad presently serving the Port. The Commission misapplied Section 1(18) of the Act in giving this statement as a reason for its granting the applications since the purpose of Section 1(18) is to prevent unbridled railroad competition and to curb wasteful invasion by railroad carriers of territories of other rail carriers. Evidence of large numbers of operations by competing modes of transportation were not considered by Congress in enacting Section 1(18) as a reason for new rail operations.

(9) The Commission based its conclusion upon the mere statement that carriers have no legal right to exclusive occupancy of a territory. It is the declared intent and purpose of Congress and of Section 1(18) that before the competing certificate may be granted, it must be established that the pioneer in the field is unable adequately to perform the services which may be found necessary and convenient by the Commission, that the pioneer in the field cannot render any additional service to meet the service proposed, and that [fol. 6186] the pioneer cannot furnish the service required by public convenience and necessity. The Commission abused its discretion in disregarding these controlling factors.

B

The Commission abused its discretion in disregarding the effect of the Pullman conditions, imposed by the Commission, as a condition to the Rock purchase, and which required the Rock Island to operate in a nondiscriminatory, neutral and impartial manner with regard to promptness and frequency of service to all Chicago railroads having cars destined to or from the Port.

The Commission merely concluded that Rock Island-Pullman placed too much emphasis on the effect of the Commission's decision in *Pullman Railroad Company Control, etc.*, Finance Docket No. 16252 (1949), approving the acquisition by Rock Island of Pullman at a large cost, and of the Illinois Supreme Court's opinion in *Chicago, R. I. & P. R. Co.* vs. *Illinois Commerce Commission*, 74 N.E.2d 136 (Ill. 1953), prohibiting the Illinois Central from invading Rock Island-Pullman territory. The Commission abused its discretion by giving little weight, if any, to the investment of the Rock Island since the Congressional purpose in enacting Section 1(18), as shown by the prior decisions of the courts and the Commission, was to preserve the earning capacity and conserve the financial resources of individual carriers, and to permit property employed by individual carriers to earn a reasonable return.

C

The Commission abused its discretion in basing its decision on the ground that, except for Rock Island-Pullman and Nickel Plate, everyone appearing at the hearing supported the additional service proposed, since the Commission is not authorized to grant applications on a mere expression of a desire for additional rail service by a majority or even nearly all shippers and others, private or public, who appeared at the hearing. There must be evidence that public convenience and necessity require the construction.

D

The Commission abused its discretion in granting the applications when the only result would be to further the private selfish interests of the applicants since the Congres- [fol. 6187] sional purpose in enacting Section 1(18) was to substitute, as the basis for the construction of new lines of railroad, the test and rule of public convenience and necessity in place of the previously controlling policy of the private desires and ambitions of owners of railroads.

E

The Commission abused its discretion in granting the applications upon the theory that Pennsylvania's purchase of industrial property at the Port, already served exclusively by Rock Island-Pullman, gave applicants a right to invade the territory, there being no proof of public convenience and necessity for Pennsylvania service to this industry.

F

(1) The Commission exceeded its power and statutory authority in granting authority going beyond the scope of the applications, particularly (a) granting authority to applicants to handle traffic which the applicants stated their applications did not cover, and (b) granting authority to railroads not even filing applications to serve parts of the territory.

(2) The Commission exceeded its power and statutory authority in approving applications to operate on Port tracks which were not presented and, hence, not ripe for consideration and determination because the contracts with the Port District providing for operation within the Port were not in existence. The Commission approved the instant applications without knowing what the provisions of the contracts, if any were entered into, would be and without knowing whether it would or could approve the contracts, if, as and when the contracts were presented for

approval, and with full knowledge that the authority granted could not be operable unless and until the contracts were approved.

(3) The Commission exceeded its power and statutory authority by basing its decision on the finding that if additional yard facilities were required by the applicants by reason of the overtaxing of the Port Yard, the adjacent Kensington Yard of the New York Central and Michigan Central would be available, although no application for the use of said yard by the applicants individually or by the joint switch crew, or any operational or financial facts were before the Commission for consideration or decision. The Commission thereby prejudged a future possible Section [fol. 6188] 5(2) application as the basis for favorably acting on the applications before it.

(4) The Commission abused its discretion and exceeded its power and statutory authority in authorizing applicants to construct a track and to operate only up to the Port District entrance solely on the erroneous theory that the proposed service to industries within the Port District was required, a service, however, which the applicants may not lawfully perform, according to the Commission, without the filing of further applications and the obtaining of further authority from the Commission. The Commission thus prejudged future possible (though not certain) applications and, on the assumption they would be approved, approved the instant applications.

G

The Commission granted applications which would give rate preferences to the industries located at the Port which compete with other industries located outside the Port without even mentioning the discrimination which would result in favor of these industries located at the Port, thus violating the National Transportation Policy (49 U.S.C. preceding Sec. 1 of the Interstate Commerce Act) and the

Interstate Commerce Act. It did this without ruling on the Rock Island proposal to the effect that if the problem of higher cross-town switch charges when two or three lines of railroad are involved is a problem requiring solution, arrangements should be made by all railroads to bring about one level of rates for all intra-switching district traffic regardless of the number of railroads involved. By its failure the Commission abused its discretion and failed to exercise its statutory duty.

H

The action of the Commission is unsupported by substantial evidence, is against the weight of the evidence, and is not based upon a consideration of the whole record, including damaging admissions and inconsistent and damaging positions of the applicants, all of which were ignored by the Commission. In fact the record contains substantial evidence in conflict with the conclusions reached by the Commission, which evidence has been ignored and not weighed by the Commission or has been misinterpreted by it. Also, the Commission relied on immaterial evidence.

[fol. 6189]

I

The Commission approved the applications thereby endorsing a plan of operation which was shown by the evidence and the admissions of the applicants to be inoperable, all of which constituted an abuse of discretion and constituted action beyond the power and statutory authority of the Commission.

J

The Commission abused its discretion and failed to exercise its statutory duty in misstating or omitting from consideration Rock Island-Pullman positions contrary to the provisions of Section 8(b) of the Administrative Procedure Act.

K

The Commission erred in relying on cases which did not support its conclusion because the facts in those cases were different from those here. In one instance the case relied on supported the Rock Island position.

L

The general rules of the Commission prohibit the filing of replies to replies but the Commission retains the discretion to allow replies to replies to be filed when justified. The Commission abused its discretion when, in spite of the reasons stated in the motion for leave to file a reply to the applicants' reply to the exceptions of the Rock Island, it refused to permit the Rock Island's reply to be filed. It then allowed to the Rock Island only one hour on oral argument, an inadequate period of time in view of the Commission's refusal to allow a reply to the reply to be filed. The Commission further abused its discretion when it stated that the Rock Island had, in fact, filed a reply to a reply when the Rock Island filed a motion to strike certain allegations in the applicants' reply to the Rock Island's petition for reconsideration because the allegations were untrue, immaterial and outside of the record and, hence, were immaterial, impertinent and scandalous. On the ground that the motion was a reply, the Commission refused to allow the motion to be filed. The result of these actions of the Commission was to deny to the Rock Island an opportunity to present its case fairly.

[fol. 6190] M

The Commission's report and orders are otherwise arbitrary, capricious and without support in and contrary to the law and the evidence, and are unjust and inequitable.

9. Notwithstanding the gravity of the errors in fact and in law upon which the report and order of the Commission dated October 5, 1959 are grounded, the extensive detail of

evidence of record supporting the plaintiffs' claims, and the far-reaching nature of the precedents established, which were brought to the attention of the Commission in the plaintiffs' petitions for reconsideration and reargument, the Commission denied the plaintiffs' petitions for reconsideration and reargument and made its order effective March 22, 1960.

10. Unless the orders of the Commission are restrained and enjoined by order of this Court, the applicants will proceed to construct the tracks which the Commission authorized them to construct, all to the irreparable injury and damage of the plaintiffs.

11. If the applicants are permitted to construct the trackage which the Commission has authorized the applicants to construct and to exercise their trackage rights, the plaintiffs will be deprived of the rights and protection afforded to them by the laws of the United States, which rights and protection will be irretrievably lost and will not be compensable in damages. Unless this Court issues a permanent injunction restraining the Interstate Commerce Commission from authorizing the applicants to proceed with their plans and from dismissing for that reason the applications, plaintiffs will suffer irreparable damage. Plaintiffs have no adequate remedy at law.

Wherefore, Plaintiffs pray:

1. That process may issue against the United States of America and Interstate Commerce Commission.

2. That a Court constituted as required by Title 28, U.S.C. Sections 2284 and 2321-2325, be convened.

3. That said Court, upon final hearing of this action, enter a decree herein permanently suspending, enjoining, setting aside and annulling the aforesaid orders of the Interstate Commerce Commission and permanently enjoining the Commission from approving said applications.

[fol. 6191] 4. That plaintiffs have recovery of the proper costs of this action.

5. That plaintiffs be granted such other and further relief as may be just and equitable.

Respectfully submitted,

Edwin Knachel, 1706 Union Commerce Building, Cleveland 14, Ohio;

Bruce Dwinell, 1025 LaSalle Street Station, Chicago 5, Illinois;

Joseph B. Fleming, John L. Bordes, Of Kirkland, Ellis, Hodson, Chaffetz & Masters, Prudential Plaza, Chicago 1, Illinois;

John Guandolo, 1120 Connecticut Avenue, N.W., Washington 6, D. C., Attorneys for Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, Interveners.

Dated: April 7, 1960

[fol. 6194]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

SUPPLEMENT TO COMPLAINT—April 14, 1960

I.

The Plaintiff, The New York, Chicago and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate"), filed its complaint in above entitled proceeding on April 4, 1960. On April 6, 1960, Nickel Plate received a document entitled "Supplement to Application," dated April 4, 1960 and believed to have been filed with the Interstate Commerce Commission on April 6, 1960 by Illinois Central Railroad Company, The Pennsylvania Railroad Company, and Chicago, South Shore and South Bend Railroad, applicants in Finance Docket No. 19538. The prayer for relief in said document states:

> "WHEREFORE applicants pray that your Commission enter a further or modified order granting all necessary authorization and approval, and certificate of public convenience and necessity, in order to permit applicants to operate over the tracks owned by the

Chicago Regional Port District at Lake Calumet Harbor, to the extent necessary to serve the elevators, industries, docks, and other shippers located on such tracks." (pp. 2-3)

Said document includes as an exhibit a copy of an unexecuted lease agreement between the Chicago Regional Port District and the operating railroad applicants in the Commission proceedings for which Nickel Plate has sought Court review.

[fol. 6195] II.

On April 7, 1960, Nickel Plate received a document entitled "Supplements to Earlier Applications," undated, but believed to have been filed with the Interstate Commerce Commission on April 6, 1960 by The Michigan Central Railroad Company, The New York Central Railroad Company and Indiana Harbor Belt Railroad Company, applicants in Finance Docket Nos. 19448 and 19921. Said document contains a prayer for relief substantially similar to that quoted earlier herein as well as a request to the Interstate Commerce Commission to waive any further publication of notice or promulgation of information. Said document also indicates that the original thereof filed with the Interstate Commerce Commission contains a copy of the aforementioned unexecuted lease agreement.

III.

On April 14, 1960, Nickel Plate received a document entitled "Application and Supplement to Earlier Application," dated April 4, 1960 and believed to have been filed with the Interstate Commerce Commission on April 6, 1960 by The Belt Railway of Chicago, applicant in Finance Docket No. 19742. Said document contains a prayer for relief similar to that made by The Michigan Central Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company in their "Sup-

plements to Earlier Applications" referred to above in Paragraph II. Said document also indicates that the original thereof filed with the Interstate Commerce Commission contains a copy of the aforementioned unexecuted lease agreement.

IV.

Said documents filed with the Interstate Commerce Commission by the applicants in said proceedings before said Commission do not change or modify in any respect the basis or the prayer for relief contained in the complaint filed herein by Nickel Plate. Nickel Plate plans to file appropriate responses to said documents with the Interstate Commerce Commission.

Respectfully submitted,

Thomas O. Broker, Attorney for Plaintiff, 3016 Terminal Tower, P. O. Box 6119, Cleveland 1, Ohio.

Dated: April 14, 1960

[fol. 6196] [File endorsement omitted]

[fol. 6197]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Interveners

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, and PULLMAN RAILROAD COMPANY, a corporation, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

SUPPLEMENT TO COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY—April 26, 1960

I

The Intervening Plaintiffs, Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company (hereinafter designated jointly as "Rock Island-Pullman"), filed their complaint in the above-entitled proceeding on April 7, 1960. Rock Island-Pullman received a document

entitled "Supplement to Application," dated April 4, 1960 and believed to have been filed with the Interstate Commerce Commission on April 6, 1960 by Illinois Central Railroad Company, the Pennsylvania Railroad Company, and Chicago, South Shore and South Bend Railroad, applicants in Finance Docket No. 19538. The prayer for relief in said document states:

> "WHEREFORE applicants pray that your Commission enter a further or modified order granting all necessary authorization and approval, and certificate of public convenience and necessity, in order to permit applicants to operate over the tracks owned by the [fol. 6198] Chicago Regional Port District at Lake Calumet Harbor, to the extent necessary to serve the elevators, industries, docks, and other shippers located on such tracks." (pp. 2-3)

Said document includes as an exhibit a copy of an unexecuted lease agreement between the Chicago Regional Port District and the operating railroad applicants in the Commission proceedings for which Rock Island-Pullman have sought Court review.

II

Rock Island-Pullman received a document entitled "Supplements to Earlier Applications," undated, but believed to have been filed with the Interstate Commerce Commission on April 6, 1960 by The Michigan Central Railroad Company, The New York Central Railroad Company and Indiana Harbor Belt Railroad Company, applicants in Finance Docket Nos. 19448 and 19921. Said document contains a prayer for relief substantially similar to that quoted earlier herein as well as a request to the Interstate Commerce Commission to waive any further publication of notice or promulgation of information. Said document also indicates that the original thereof filed with the Interstate Commerce Commission contains a copy of the aforementioned unexecuted lease agreement.

III

Rock Island-Pullman received a document entitled "Application and Supplement to Earlier Application," dated April 4, 1960 and believed to have been filed with the Interstate Commerce Commission on April 6, 1960 by The Belt Railway Company of Chicago, applicant in Finance Docket No. 19742. Said document contains a prayer for relief similar to that made by The Michigan Central Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company in their "Supplements to Earlier Applications" referred to above in Paragraph II. Said document also indicates that the original thereof filed with the Interstate Commerce Commission contains a copy of the aforementioned unexecuted lease agreement.

[fol. 6199]

IV

Rock Island-Pullman filed with the Interstate Commerce Commission on April 22, 1960, a document entitled "Answer and Protest and Intervening Petition of Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company," in which they opposed approval of the "Supplement to Application" filed by the Illinois Central Railroad Company, Pennsylvania Railroad Company, and the Chicago South Shore and South Bend Railroad Company, the "Supplements to Earlier Applications" filed by The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company, and "Application and Supplement to Earlier Application" filed by The Belt Railway Company of Chicago, on the grounds, among others, that Rock Island-Pullman

> "... are adequately serving the Chicago Regional Port District; that they have expended large sums of money in the construction of facilities to serve it; that they propose to and are prepared to expend further sums of money to keep themselves in a position to serve said Chicago Regional Port District adequately; that they

are entitled to retain the traffic of the Chicago Regional Port District; that there is no reason adequate in law for the extension of the line of railroad of the applicants into territory heretofore exclusively served by petitioners; that the expenditures of sums of money required to be spent by applicants for the construction of the proposed extension cannot be justified either in fact or in law; and that the extension of the line of railroad of applicants is not supported by public convenience or necessity."

The documents filed with the Commission by applicants do not make entirely clear whether they are supplements or amendments to the original applications, or new applications. This was called to the attention of the Commission by Rock Island-Pullman in the opening paragraph of their pleading, and elsewhere. In this regard, Rock Island-Pullman stated:

"(h) While these documents are variously labeled, they are, in our opinion, in fact, applications requesting authority of the Commission which the Commission has found had not been previously requested."

Rock Island-Pullman requested the Commission to grant a hearing on the Supplements to the Applications described in paragraphs I, II, and III above.

[fol. 6200] The "Supplement to Application," "Supplements to Earlier Applications," "Application and Supplement to Earlier Application," and "Answer and Protest and Intervening Petition of Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company" are attached hereto as appendices A, B, C, and D, respectively.

V

The documents (appendices A, B, and C) are some of the applications which we allege in our Bill of Complaint the Commission prejudged favorably when it entered its order

now before the Court for its consideration. On pages 12 and 13 of the Complaint filed with the Court (paragraph 8 F (2) and (4)) are the allegations dealing with this matter, reading as follows:

> "(2) The Commission exceeded its power and statutory authority in approving applications to operate on Port tracks which were not presented and, hence, not ripe for consideration and determination because the contracts with the Port District providing for operation within the Port were not in existence. The Commission approved the instant applications without knowing what the provisions of the contract, if any were entered into, would be and without knowing whether it would or could approve the contracts, if, as and when the contracts were presented for approval, and with full knowledge that the authority granted could not be operable unless and until the contracts were approved.
>
> "(4) The Commission abused its discretion and exceeded its power and statutory authority in authorizing applicants to construct a track and to operate only up to the Port District entrance solely on the erroneous theory that the proposed service to industries within the Port District was required, a service, however, which the applicants may not lawfully perform, according to the Commission, without the filing of further applications and the obtaining of further authority from the Commission. The Commission thus prejudged future possible (though not certain) applications and, on the assumption they would be approved, approved the instant applications."

In dealing with issues previously before it in the case, the Commission set forth the prerequisites and material issues for a decision in the proceedings before it by stating in its report of October 5, 1959 (Sheet 5):

"Orderly procedure dictates that all applications required to effect the entire plan be heard simultaneously, particularly, as here, where the evidence to be presented in support of the construction and trackage rights is identical."

Although the language quoted above dealt with issues heretofore raised in the case, it is clearly applicable in this situation.

[fol. 6201] The Commission should not have issued any order until these Applications had been filed, a hearing held, and a decision reached on the entire matter.

VI

The documents filed with the Commission (appendices A, B, and C) do not change or modify in any respect the basis or prayer for relief contained in the Complaint filed by Rock Island-Pullman with this Court.

Wherefore, the Plaintiffs pray that the relief prayed for in the Complaint be granted.

Respectfully submitted,

Edwin Knachel, 1706 Union Commerce Building, Cleveland 14, Ohio;

Bruce Dwinell, 1025 La Salle Street Station, Chicago 5, Illinois;

Joseph B. Fleming, John L. Bordes, Kirkland, Ellis, Hodson, Chaffetz & Masters, Prudential Plaza, Chicago 1, Illinois;

John Guandolo, 1120 Connecticut Avenue, N.W., Washington 6, D. C., Attorneys for Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, Interveners.

April 26, 1960

[fol. 6202]

CLERK'S NOTE

APPENDIX A TO SUPPLEMENT TO COMPLAINT

"Supplement to application of Central, Pennsylvania and South Shore in Finance Docket No. 19538, dated April 4, 1960" is omitted from the record here. It is printed at pages 335-337 supra.

[fol. 6208]

CLERK'S NOTE

Exhibit S-1 to Appendix A—"Lease Agreement" is omitted from the record here. It is printed at pages 337-342 supra.

[fol. 6214]

CLERK'S NOTE

APPENDIX B TO SUPPLEMENT TO COMPLAINT

"Supplements to earlier applications of Michigan Central, New York Central, and Harbor in Finance Dockets Nos. 19448 and 19921" is omitted from the record here. It is printed at pages 343-349 supra.

[fol. 6223]

CLERK'S NOTE

APPENDIX C TO SUPPLEMENT TO COMPLAINT

"Application and supplement to earlier application of The Belt Railway Company in Finance Docket No. 19742" is omitted from the record here. It is printed at pages 329-334 supra.

[fol. 6232]

CLERK'S NOTE

APPENDIX D TO SUPPLEMENT TO COMPLAINT

"Answer and protest and intervening petition of Rock Island and Pullman in Finance Dockets Nos. 19538, 19448, 19921 and 19742" is omitted from the record here. It is printed at pages 349-356 supra.

[fol. 6240] [File endorsement omitted]

[fol. 6241]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

SECOND SUPPLEMENT TO COMPLAINT—May 4, 1961

I.

On April 4, 1960 the plaintiff, The New York, Chicago and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate"), filed its complaint in above entitled proceeding against the United States of America and the Interstate Commerce Commission for the purpose of suspending, enjoining, setting aside and annulling the report, order and certificate, as corrected, of the Interstate Commerce Commission in various finance dockets before said Commission as enumerated in detail in said complaint. All of said finance dockets relate to the effort of six railroads to institute railroad service in the Lake Calumet area, Cook County, Illinois.

On April 14, 1960 Nickel Plate filed a supplement to complaint advising the Court that the various railroad applicants had filed with the Interstate Commerce Commission documents seeking to supplement their earlier applications [fol. 6242] to the Interstate Commerce Commission. In its said supplement to complaint Nickel Plate advised the

Court that the supplemental documents filed by the applicants with the Interstate Commerce Commission do not change or modify in any respect the basis or the prayer for relief contained in the complaint filed herein by Nickel Plate. Nickel Plate further advised the Court that it planned to file appropriate responses to said documents with the Interstate Commerce Commission. Since the Interstate Commerce Commission was considering this matter further, as the result of the filing of the supplements to applications, the undersigned attorney for Nickel Plate and the attorney for the defendants herein stipulated that said defendants would have thirty (30) days in which to answer or otherwise plead after the plaintiff, Nickel Plate, filed an amended or supplemental complaint in this proceeding before the Court. With the filing of this Second Supplement to Complaint, the defendants are now in the position to answer or otherwise plead in this proceeding.

II.

After the applicants before the Interstate Commerce Commission filed their various supplements to applications, as described in Nickel Plate's Supplement to Complaint, dated April 14, 1960, Nickel Plate filed with the Interstate Commerce Commission a document entitled "Answer and Protest and Intervening Petition of The New York, Chicago and St. Louis Railroad Company" in which Nickel Plate pointed out the deficiencies of the applicants' requests to the Interstate Commerce Commission for authority.

III.

By document dated May 10, 1960 the applicants before the Interstate Commerce Commission filed a document entitled "Applicants' Reply to Answers, Protests and Intervening Petitions of The New York, Chicago and St. Louis [fol. 6243] Railroad Company, Chicago, Rock Island and Pacific Railroad Company, and Pullman Railroad Company, in which said applicants contended among other

things that Nickel Plate is not entitled to a hearing in the matter and requesting the Interstate Commerce Commission to supplement its order of October 5, 1959 (307 I.C.C. 493) so as to authorize the applicants to operate over the tracks of the Chicago Regional Port District in order to serve facilities at Lake Calumet Harbor in Cook County, Illinois.

IV.

By letter dated May 17, 1960 to the Interstate Commerce Commission Nickel Plate again stated its position "that simultaneous hearings must be held on all applications required to effectuate the applicants' plan before any of the applications or supplements can be approved."

V.

By document dated May 18, 1960 the Chicago South Shore & South Bend Railroad Company filed an application under Section 1(18) of the Interstate Commerce Act (49 U.S.C. §1(18)) for authority to operate a line of railroad approximately 10.6 miles of tracks, presently owned by and located on the property of the Chicago Regional Port District at Lake Calumet.

VI.

The Interstate Commerce Commission by Supplemental Report decided September 19, 1960 (312 I.C.C. 277), issued September 26, 1960, approved the supplements to applications filed by the various railroad applicants and issued as part thereof a "Supplemental Certificate of Public Convenience and Necessity" to permit the various railroad applicants to operate over the existing tracks of the Chicago Regional Port District at Lake Calumet Harbor in Cook County, Illinois. A copy of said Supplemental Report and of said Supplemental Certificate of Public Con-
[fol. 6244] venience and Necessity are attached hereto and

made part hereof as Appendix H (Appendices A to G, inclusive, are attached to original complaint).

VII.

On November 3, 1960 Nickel Plate filed with the Interstate Commerce Commission a document entitled "Petition of The New York, Chicago and St. Louis Railroad Company for Reconsideration of the Supplemental Report of the Commission dated September 19, 1960, For Argument, and For Postponement of the Effective Date of the Supplemental Certificate of Public Convenience and Necessity dated September 19, 1960." In its said petition Nickel Plate set forth the deficiencies of the Commission's reports, orders, and certificates, including the report and certificate dated September 19, 1960 in these proceedings.

VIII.

By order dated April 18, 1961, issued April 25, 1961 the Interstate Commerce Commission denied the aforementioned petition for reconsideration and other relief as filed by Nickel Plate. A copy of said order is attached hereto and made a part hereof as Appendix I.

IX.

Nickel Plate repeats herein and incorporates by reference the allegations contained in its complaint and supplement to complaint filed herein and asserts that the deficiencies of the reports, certificates, and orders of the Interstate Commerce Commission as described in said complaint had not been cured or corrected by the Commission's report and supplemental certificate of September 19, 1960. In addition, Nickel Plate asserts that the Commission's Supplemental Report and Supplemental Certificate of Public Convenience and Necessity dated September 19, 1960 are arbitrary, in abuse of discretion, not in accordance with law, contrary to constitutional right, in excess of statutory

jurisdiction and authority, not in observance of procedure required by law, and unsupported by substantial evidence in the following respects and for the following reasons, [fol. 6245] among others:

1. The Commission erroneously approved the supplemental applications on the basis of evidence introduced at a hearing held before the supplemental applications were filed, such evidence consisting of a proposed lease and operating arrangement as to which material issues the protestants were denied prior notice.

2. The Commission erroneously denied a hearing after the supplemental applications were filed. Since a single plan for service is involved and a hearing was held to be necessary on the original limited applications, the protestants automatically became entitled to a hearing on the applications covering the third phase of the plan. Because the Commission had acted prematurely in its report of October 5, 1959 by approving segments of the single plan without having all required applications before it, the Commission erred in failing to hold a hearing on the entire plan after the supplements were filed. In addition, said supplemental applications failed to comply with standing rules of the Interstate Commerce Commission.

3. The Commission erroneously approved the supplemental applications on the basis of a prejudgment of the lease and joint facility in proceedings in which such lease and joint facility could not be approved. [fol. 6246] By finding in its report of October 5, 1959 that the lease and joint facility would, after compliance with conditions therein imposed, serve public convenience and necessity, the Commission had prejudged applications not yet filed for such authority. By adopting such findings in its report of Septem-

ber 19, 1960 without a hearing, the Commission's authorization of the supplemental applications was based solely on such prejudgment.

4. The Commission erroneously relied on a record made three years previously and on findings made on such record one year previously without evidence circumstances previously testified to still prevailed.

5. The Commission erroneously approved the supplemental applications on insufficient and deficient evidence:

   a. There is no evidence that the applicants can ever put their plan into operation. From their own standpoint, the applicants do not have authority to file the new applications and, hence, to execute the lease and establish the operating arrangement within the Port District. From the standpoint of the Chicago Regional Port District, there is no evidence it will execute the lease submitted with the supplemental applications.

   b. The applicants have not offered evidence as to the amounts of the maximum or minimum rental to be paid under the lease, and they did not offer evidence to prove that traffic which might be handled by them to and from the Port District would be compensatory.

   [fol. 6247] c. The Commission erroneously approved the new applications on stale evidence of public convenience and necessity. The evidence consisted of opinion estimates made three years previously in 1957 as to possible future traffic upon completion of port facilities and year round operation thereof. Three full shipping seasons have occurred since the hearings, including two seasons since enlargement of the St. Lawrence Seaway. Up-to-date evidence is available to the applicants and the Commission.

6. The Commission erroneously approved the applications and supplement to applications without requiring the applicants to fulfill their burden of proof, and by approving the original and supplemental applications piecemeal without a full and complete hearing on the entire plan for service after fair and prior notice of the material issues.

X.

Plaintiff will be irreparably damaged if said reports, orders, and certificates of public convenience and necessity, as corrected and supplemented, are not permanently suspended, enjoined, set aside, and annulled, and is without adequate remedy at law.

XI.

Wherefore, Plaintiff prays, in addition to its prayers for relief as set forth on pages 12 and 13 of its Complaint dated April 4, 1960 herein, as follows:

1. That the United States of America and Interstate Commerce Commission be required to file their answer or answers, or other pleadings to the complaint, supplement to complaint, and this second supplement to complaint filed herein by Nickel Plate.

[fol. 6248] 2. That a Court constituted as required by U.S.C. Title 28, Sections 2284, and 2321-2325, consisting of three judges, of whom at least one shall be a circuit judge, be convened, and that said Court so constituted and convened shall hear the complaint, supplement to complaint, and this second supplement to complaint upon due and legal notice to defendants;

3. That said Court upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside, and annulling the said reports, certificates, and orders of the Interstate Commerce Com-

mission and permanently enjoining the Commission from approving said applications and supplements to applications;

4. That Plaintiff have and recover of the defendants the proper costs of this suit; and

5. That Plaintiff have such other and further relief in the premises as to equity may appertain and as may be deemed by this Court fit and proper.

Respectfully submitted,

Thomas O. Broker, Attorney for Plaintiff, 3016 Terminal Tower, P. O. Box 6119, Cleveland 1, Ohio.

Dated: May 4, 1961

[fol. 6249]

CLERK'S NOTE

APPENDIX H

"Supplemental Report and Certificate of the Commission, decided September 19, 1960 in Finance Dockets Nos. 19538, 19742, 19921" are omitted from the record here. They are printed at pages 383-395 supra.

[fol. 6263] [File endorsement omitted]

[fol. 6264]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

Interveners

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, and PULLMAN RAILROAD COMPANY, a Corporation, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

SECOND SUPPLEMENT TO COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY—May 12, 1961

By their supplement to their complaint filed April 26, 1960, these plaintiffs detailed the facts concerning the filing of new applications with the Interstate Commerce Commission by the Pennsylvania Railroad Company, Illinois Central Railroad Company, Chicago South Shore and South Bend Railroad Company, Michigan Central Railroad Company, New York Central Railroad Company, Indiana Har-

bor Railroad Company, and Belt Railway Company of Chicago.

By these new applications, the applicants sought authority to operate over tracks owned by the Chicago Regional Port District to the extent necessary to serve the elevators, industries, docks and other shippers located on such tracks. They also asked approval of a proposed lease of said tracks.

In said supplement to complaint, these plaintiffs also recited the facts as to the filing by them on April 22, 1960 of a document by which they opposed the granting of such applications and requested a hearing, setting forth the facts justifying the request.

[fol. 6265] Copies of all documents referred to were attached to said supplemental complaint.

In due course, the said applicants filed a reply to Plaintiff's opposition to the new applications.

Without a hearing, the Commission proceeded to consider the applications, and by its order of September 19, 1960, 312 I.C.C. 277, granted the authority sought in the new applications and approved the proposed lease.

On November 3, 1960, these plaintiffs filed a petition for reconsideration of the order of September 19, 1960, and for argument.

The applicants then filed their reply to these plaintiffs' petition for reconsideration of the order of September 19, 1960, and for argument.

On April 18, 1961, the Commission entered its order denying the petition for reconsideration and argument.

I.

By not according these plaintiffs a full and complete hearing on the new applications to operate over the tracks of the Port District, a prerequisite to the making of a valid order, the Commission has deprived these plaintiffs of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States. The authority sought in the new applications could not properly be granted by the Commission without full prior compliance

with all requirements of procedure and law which, among other requirements, would include hearings on any and all aspects of the plan to reach and serve Lake Calumet Port and a decision in accordance with the evidence, and plaintiffs were prejudiced by the Commission's forming a judgment without affording them a hearing.

II.

The Order of April 18, 1961, is invalid in that it fails to set forth a statement of findings and conclusions as well as the reasons or basis for the Commission's decision upon [fol. 6266] all the material issues of fact and law presented in plaintiff's Petition for Reconsideration and Argument of the Decision, Order and Certificate of the Commission dated September 19, 1960, as required by Section 8 of the Administrative Procedure Act (5 U.S.C. 1007) and section 14(1) of the Interstate Commerce Act (49 U.S.C. 14). The Order of April 18, 1961, merely denies plaintiff's Petition for Reconsideration and Argument on the ground that there has been presented no material error of facts or conclusions of law and that the decision of the Commission is based on adequate findings of fact supported by the record. By section 8 of the Administrative Procedure Act and section 14(1) of the Interstate Commerce Act, plaintiffs are entitled to more than this stereotyped language. In plaintiff's Petition for Reconsideration and Argument, evidence not theretofore available was recited which would have been introduced had a hearing been held on the new applications. This evidence would have proved that actual experience at Lake Calumet Port demonstrated that the improvidence of the proposed operation by applicants would have been greater than that heretofore shown in the record; that Eastern Territory traffic to and from the Port is extremely limited, thus the Pennsylvania Railroad Company, New York Central Railroad Company and Chicago, South Shore & South Bend Railroad Company would have no substantial interest in the business at the Port; that the Port District yard facilities are not large enough to be used for receiving and breaking up applicants' inbound

trains and making up and dispatching their outbound trains, so it will be necessary for applicants to use other yards for which they would have to pay rent, and to date no arrangements have been made for the use of other yards and no applications have been filed for such use; that the St. Lawrence Seaway traffic has failed to meet applicants' expectations; that the Rock Island's service at Lake Calumet Port has been adequate; that estimated traffic to and from Lake Calumet Port has been grossly overstated by [fol. 6267] applicants; and that during the period from April 1, 1959 to March 31, 1960, the road-haul revenue of the Rock Island to and from the Port area totaled over $800,000, all of which would have been susceptible to loss by the Rock Island if the applicants had been operating in the Port. Even though the granting or denial of a petition for reconsideration is within the discretion of the Commission, there was an abuse of that discretion in denying these plaintiffs the opportunity to prove the facts as above outlined.

III.

The Commission flouted public convenience and necessity when it held, in denying a hearing, that the private convenience of the applicants was more important than public convenience and necessity.

IV.

The report and order of September 19, 1960, and the order of April 18, 1961, are erroneous, are not supported by the record, constitute an abuse of discretion and are unlawful, arbitrary, capricious and null and void for the following reason among others:

A. The Commission based its conclusion that the new applications should be granted upon its approval of a proposed lease of Port District tracks which had never been discussed with the Port District and which these plaintiffs showed in their request for a

hearing would not be executed by the District. It was shown by these plaintiffs in their petition for reconsideration that this proposed lease had in fact been rejected by the Port District and was in fact a mere piece of paper. Thus, the Commission did an idle thing in approving the proposed lease and [fol. 6268] refused in its latest order (the order of April 18, 1961) to modify its original order. This constituted an abuse of discretion and violated the rights of these plaintiffs in that an order granting the new applications to operate on the tracks of the Port District was based on the approval of a lease which did not exist and would not exist.

B. The Commission abused its discretion when it disregarded the language of the first applications and attributed to the applicants an intention to operate within the Port District which they did not express, and then based its decision on the unexpressed intention, using this theory to deny plaintiffs a hearing on the new applications.

C. The Commission deprived plaintiffs of valuable rights when it excused the applicants from complying with its rules and regulations for the supplying of information required of all applicants under Section 1 (18) of the Interstate Commerce Act.

D. The Commission prejudged future applications, repeating the same error which it made in its first order, the order of October 5, 1959 (307 I.C.C. 493).

E. The Commission repeated its errors of granting authority to serve Calumet Harbor Terminals though no applications to serve these terminals have ever been filed and no evidence was produced as to them.

[fol. 6269] F. The Commission's report and orders are otherwise arbitrary, capricious and without support in and contrary to the law and the evidence and are unjust and inequitable.

V.

Plaintiffs repeat herein and incorporate by reference the allegations contained in their original complaint and supplement to complaint filed herein, and assert that the reports, certificates and order of the Commission, as described in said complaint as supplemented, were not cured by the Commission's report and order of September 19, 1960, (312 I.C.C. 277) and the order of April 18, 1961.

VI.

WHEREFORE, these plaintiffs pray, in addition to the relief prayed for in their original complaint, as supplemented:

(1) That the Court, upon final hearing of this action, enter a decree herein permanently suspending, enjoining, setting aside and annulling the orders of October 5, 1959, September 19, 1960, and April 18, 1961, of the Interstate Commerce Commission and permanently enjoining the Commission from approving said applications.

(2) That plaintiffs be granted such other and further relief as may be just and equitable.

Respectfully submitted,

Edwin Knachel, 1706 Union Commerce Building, Cleveland 14, Ohio;

Bruce Dwinell, T. E. Desch, 1025 LaSalle Street Station, Chicago 5, Illinois;

Joseph B. Fleming, John L. Bordes, Kirkland, Ellis, Hodson, Chaffetz & Masters, Prudential Plaza, Chicago 1, Illinois;

John Guandolo, 1120 Connecticut Avenue, N.W., Washington 6, D. C., Attorneys for Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company,

Interveners

May 12, 1961

[fol. 6270]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION
Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY, Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION TO COMPLAINTS OF THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY—June 1, 1961

The United States of America and the Interstate Commerce Commission, defendants, answer the allegations of the complaints of The New York, Chicago and St. Louis Railroad Company, as follows:

1.

Admit the allegations contained in paragraphs I-IV, VI, and VII of the original complaint.

2.

Admit the allegations contained in paragraph V of the complaint except any implication contained in the last sen-

[File endorsement omitted]

[fol. 6271] tence thereunder that the Nickel Plate can serve Lake Calumet via it own lines.

3.

Answering the allegations contained in paragraph VIII of the complaint, defendants admit that the plaintiffs sought outright denial of the applications upon the grounds and for the reasons set forth in said paragraph, but allege that the Commission carefully considered such contentions in arriving at its conclusion and was not convinced that such contentions should control when viewed in the light of the entire record.

4.

Deny the allegations contained in paragraphs IX and X.

5.

Admit all of the allegations contained in the Supplement to Complaint, and allege that the findings of the Commission upon the requests contained in the documents referred to therein are contained in the Supplemental Report of the Commission dated September 19, 1960, a copy of which is attached to the Second Supplement to Complaint as Appendix "H".

6.

Admit the allegations contained in paragraphs I through VIII of the Second Supplement to Complaint.

7.

Deny the allegations contained in paragraphs IX and X of the Second Supplement to Complaint.

8.

[fol. 6272] Further answering the allegations contained in the complaints, defendants deny that the action of the Commission challenged therein is unlawful for the reasons specified, or for any other reason whatsoever. Defendants aver that the action of the Commission is fully supported and justified by the record and is valid and lawful in all

respects. Except as herein expressly admitted, defendants deny each and every allegation contained in the complaints.

Wherefore, defendants pray that the relief sought be denied, and that the complaints be dismissed with costs.

Robert W. Ginnane, General Counsel, C. H. Johns, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Lee Loevinger, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Russell E. Ake, United States Attorney, Cleveland, Ohio, Attorneys for the United States of America.

[fol. 6273]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY, Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION TO COMPLAINTS OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY, INTERVENING PLAINTIFFS—June 1, 1961

The United States of America and the Interstate Commerce Commission, defendants, answer the allegations of

the complaints of the Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, as follows:

I.

Admit the allegations contained in paragraphs 1 through 7 of the original complaint.

II.

Deny the allegations contained in paragraphs 8, 10 and 11.

[fol. 6274]

III.

Admit the allegations contained in paragraph 9 that the intervening plaintiffs' petition for consideration and reargument was denied, but deny that the Commission committed any error of fact or law in the report of October 5, 1959.

IV.

Admit all of the allegations contained in the Supplement to Complaint except the last sentence of paragraph V which is denied.

V.

Admit the allegations contained in the introductory paragraphs and deny those in paragraphs I thru V of the Second Supplement to Complaint.

VI.

Further answering the allegations contained in the complaints, defendants deny that the action of the Commission challenged therein is unlawful for the reasons specified, or for any other reason whatsoever. Defendants aver that the action of the Commission is fully supported and justified by the record and is valid and lawful in all respects. Except as herein expressly admitted, defendants deny each and every allegation contained in the complaints.

[fol. 6275] Wherefore, defendants pray that the relief sought be denied, and that the complaints of intervening plaintiffs be dismissed with costs.

Robert W. Ginnane, General Counsel, C. H. Johns, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission.

Lee Loevinger, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.;

Russell E. Ake, United States Attorney, Cleveland, Ohio, Attorneys for the United States of America.

[fol. 6276] Certificate of Service (omitted in printing).

[fol. 6277] [File endorsement omitted]

[fol. 6278]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

ANSWER OF INTERVENERS, ILLINOIS CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY AND INDIANA HARBOR BELT RAILROAD COMPANY TO COMPLAINT OF THE NEW YORK, CHICAGO, AND ST. LOUIS RAILROAD COMPANY AND SUPPLEMENT TO AND SECOND SUPPLEMENT TO SAID COMPLAINT—Filed June 6, 1961

Answering the complaints herein, the Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago, South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The Michigan Central Railroad Company, The New York Central Railroad Company, [fol. 6279] and Indiana Harbor Belt Railroad Company (hereinafter designated jointly as "interveners"), who have been permitted to intervene as defendants and parties in opposition to the complaints, respectfully say:

A.

With reference to the initial complaint filed by The New York, Chicago, and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate"):

1. Interveners admit the allegations of paragraphs I, II, III, and IV of the complaint.

2. Interveners admit the allegations of the portion of paragraph V relating to their filing of applications with the Interstate Commerce Commission to extend their lines and operations into the Lake Calumet Harbor Area, but, in the interest of a more complete and accurate statement of the facts in so far as the complaint is concerned, say that the uses and purposes of the proposed lines are to permit the interveners to serve present and future industries, elevators, warehouses, docks, and piers which are engaged in the warehousing and transfer of freight between ships, barges, motor trucks, and railroads in the Calumet Harbor port area near Chicago, in Cook County, Illinois; and, that the line proposed to be constructed and operated will receive material revenue from export, import, and domestic freight traffic to be handled to and from industries, elevators, warehouses, docks, and piers presently operating in the Calumet Harbor port area in addition to those facilities to be constructed with the further development of the area, on the one hand, and to and from origins and destinations in territory served by interveners, on the other hand.

[fol. 6280] Interveners further say that, in filing the applications, it was their contention—and the Commission found—that the public convenience and necessity require the granting of the applications, among other reasons, to permit direct service to and from the Lake Calumet Harbor area by applicants who serve the majority of the central, eastern, southern, and western states; to promote the development of the Port District itself and the potential industries connected therewith; and to expedite the flow of interstate, foreign, and overseas commerce to and from the Lake Calumet Harbor.

Answering that portion of paragraph V relating to the location of the railroads in proximity to Lake Calumet, interveners refer to the map designated as Exhibit "A"

attached to the complaint of the Chicago, Rock Island & Pacific Railroad Company and Pullman Railroad Company (hereinafter referred to as "Rock Island" and "Pullman," respectively), which shows the line of Nickel Plate is one-half mile from the eastern shore of Lake Calumet; that the main line of the Illinois Central Railroad, one of the interveners herein, is approximately the same distance from the western shore; that the line of the Michigan Central is approximately the same distance from the southwestern shore of Lake Calumet as that of the Rock Island; and that the line of the Kensington & Eastern Railroad, over which the Chicago, South Shore and South Bend operates, is adjacent to the west and south shores of Lake Calumet.

Interveners deny that portion of paragraph V which attempts to define interveners' ultimate purpose and say: Interveners' purpose is to provide a service to the area which will materially aid in the development of Lake Calumet Harbor and to participate in the ever-increasing traffic.

[fol. 6281] 3. Answering paragraph VI, the interveners refer to the applications and returns to questionnaire filed with the Commission for complete and accurate statements of the authority requested, and deny the statement of Nickel Plate in paragraph VI that interveners, as applicants, applied for authority only to construct and operate lines of railroad up to the entrance of the property owned by the Chicago Regional Port District. Interveners deny the allegations in paragraph VI including the construction and limitation placed upon the application of the intervener, Belt Railway of Chicago, and refer to the application of the Belt Railway for a fair, complete, and accurate statement of that railroad's request, i.e.:

> "Applicant in order more adequately to perform its functions as a terminal facility in the Chicago area for its proprietary lines and other railroads reaching the Chicago area, and to furnish a means of interchange between such lines and water carriers receiving or discharging freight through the Chicago

Regional Port District hereby seeks authority from the Commission to acquire trackage rights over lines of railroad in the Chicago area permitting it to operate from a point on its lines at or near 95th Street in the City of Chicago *to a point on the railroad tracks of the Chicago Regional Port District* on the west side of Lake Calumet Harbor, near 130th Street, in the City of Chicago."

Interveners also refer to page 12 of the Belt's application for a fair, complete, and accurate statement of the Belt's intentions, i.e.:

"The Lake Calumet Harbor, Port of Chicago of the Chicago Regional Port District is being developed as a complete port for the handling of interstate and foreign commerce by water on the Great Lakes, the St. Lawrence Seaway and on the high seas. It is not proper nor in the public interest to limit service at a [fol. 6282] port to the control of one carrier; indeed, this Commission has held that the public convenience and necessity would not best be served by such an arrangement. Applicant here is a terminal switching carrier serving the interests of many railroads and shippers. It is surely consistent with the public interest that such a carrier be permitted access to this Port area."

Interveners deny the allegations in paragraph VI relating to the construction and limitation placed on the application of the Michigan Central Railroad Company, New York Central Railroad, and The Indiana Harbor Belt Railroad, and refer to the application itself for a fair, complete, and accurate statement of the intentions of the applicants therein, i.e.:

"The applicants have on file before this Commission, in Finance Docket No. 19448, an Application for an extension of their lines from approximately the point

of origin in this application to a destination described as being a point within the Chicago Regional Port District in the said City, County and State."

4. Interveners admit the allegations of paragraph VII of the complaint and merely point out that the Rock Island as well as the Nickel Plate filed petitions for reconsideration of the Commission's report and order of October 5, 1959, which were denied.

5. Answering paragraph VIII of the complaint dealing with the physical description of Lake Calumet and the facilities located at the port, interveners deny that the allegations therein fairly or correctly set forth the evidence before the Commission and ask leave to refer to the record of such evidence if and when presented to the Court.

6. Answering paragraph IX of the complaint of Nickel Plate, interveners deny the allegations that the Commission's report, certificate, and orders are arbitrary, in abuse [fol. 6283] of discretion, not in accordance with law, contrary to constitutional right, in excess of statutory jurisdiction and authority, not in observance of procedure required by law, and unsupported by substantial evidence. Interveners say the Commission's report, certificate, and orders have their foundation in and are fully supported by the evidence presented to the Commission. Interveners further say there was no abuse of discretion; that the Commission conducted a full and fair hearing upon interveners' applications, at which hearing plaintiffs had full opportunity to contest the applications and present evidence to support their opposition.

Interveners further say that the record and the arguments of the parties were fully and thoroughly considered by an examiner of the Commission and thereafter were thoroughly considered by the Commission itself; that the Commission found that approval of the applications would result in greater rail competition, better service, greater car supply, and lower rates for the industries on Port Dis-

trict property at Lake Calumet Harbor; that the Commission further found additional rail service is required for the future development of the industries now or hereafter to be located there and that it would be a detriment and a hindrance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available and anxious to serve the port; and that, although the port is now served by approximately 100 common-carrier truck lines and although there is no restriction on the number of barges and ships permitted to serve the port, the Rock Island is the only railroad presently serving the port.

Interveners further say that, in so far as the allegations of error contained in the complaint are concerned, the [fol. 6284] Commission made no error of fact or law of which plaintiffs could justly complain. Although the interveners established proof that the present and future public convenience and necessity warranted their operation into the Port District and although interveners had, in their applications and returns to questionnaire as well as in their testimony at the hearing, made clear their intent to serve within the Port District and upon the Port District's tracks, the Commission found that interveners should file supplements to their applications specifically asking for authority to operate over the tracks of the Chicago Regional Port District. Interveners filed such supplements to their applications although they believed and contended that their original applications and returns to questionnaire were sufficiently broad to include such a request.

Interveners deny the allegations of paragraph IX relating to applications before the Commission and procedure by the Commission. Interveners deny the allegation that the Commission erred in receiving and considering certain evidence on the acquisition and operation of tracks within the Port District and deny the allegation that Nickel Plate was deprived of its constitutional rights to prior notice

of such issues in the proceeding. Interveners refer to the petitions of Nickel Plate and Rock Island to intervene in the proceeding before the Commission to illustrate the fact that both Nickel Plate and Rock Island were fully cognizant of interveners' intentions to serve the facilities within the Port District where, in its petition, Rock Island said:

> "By applications filed in this proceeding under Sections 1(18) and 5(2) of the Interstate Commerce Act, applicants [interveners] seek to extend their lines of railroad and operations to serve the Chicago Regional Port District which is located adjacent to petitioners' railroad tracks and is being served by them exclusively."

[fol. 6285] and where, in its petition, Nickel Plate said:

> "Petitioner opposes the application as an unjustifiable invasion of the Lake Calumet area which is now and will continue to be adequately and completely served, under both present and future development by petitioner and Chicago, Rock Island and Pacific and Pullman Railroad Companies. There is no valid reason in law or fact for the extension of the line of railroad described in the application into the area exclusively served by said petitioner and interveners."

Further answering the complaint, interveners say that plaintiff does not come into equity with clean hands, as plaintiff refuses to seek Commission authority to use the present or future tracks of the Chicago Regional Port District and to serve the industries therein while at the same time alleging that interveners' applications are incomplete for failure to contain similar requests. Nickel Plate has repeatedly stated on the record and on brief that it has no intention of seeking any authority from the Commission to serve the future facilities on the east side of Lake Calumet Harbor.

Interveners refer to plaintiffs' admission that evidence was received and findings were made on applicants' plan of operation within the Port District and the inconsistency of plaintiffs' position in asking the Commission and this Court to rule that a further hearing would be necessary to receive the same evidence and make the same findings because of an alleged technical defect in the applications.

Interveners deny the allegation that it was incumbent upon them, as applicants, to disclose the proposed method of operation on the Chicago Regional Port District property and say that interveners, in answering their return to questionnaire, disclosed without reservation all information requested by the Commission under its rules.

[fol. 6286] Referring to subparagraph 5 of paragraph IX, interveners deny the allegation that the Commission erred in granting certain of the interveners authority under Section 5(2) of the Interstate Commerce Act to operate over tracks to be built by other interveners who requested such authority under Section 1(18) of the Act. The Commission, in *City of Milwaukee* v. *Chicago & N. W. Ry. Co.*, 279 I.C.C. 521, found it would be impractical to hold two separate hearings—first under Section 1(18) and later under Section 5(2)—in order to permit the use of future tracks.

Interveners deny the allegation in subparagraph 6 of paragraph IX that the Commission established a new and lesser standard of proof for applications for railroad construction and operation to facilities owned by public bodies than to facilities owned by private industries, and refer to the ruling in the Commission's report that no such distinction should be made.

Interveners, in referring to subparagraph 7 of paragraph IX, deny that the Commission erred in finding the proposed lease of tracks and joint operating arrangements within the port would be feasible and practical, and further say that it is immaterial that the lease had not been executed. Interveners deny the allegations contained in subparagraphs 8 to and including 18 of paragraph IX as impractical, inconsistent, and contrary to law.

7. Referring to paragraph X, interveners ask leave to point out the inconsistency of the complaint. Plaintiff alleges that it will be irreparably damaged by the exercise of the authority granted to interveners by the Commission although plaintiff does not at present serve Lake Calumet and, in paragraph IX, alleged the Commission erred in finding the volume of traffic would increase materially at Lake Calumet.

[fol. 6287] 8. Further answering the complaint, interveners state that there was ample, pertinent, substantial evidence in the record before the Commission to support its findings, conclusions, and order complained of herein, and that this Court is bound, therefore, to accept the same and to hold the said order valid.

B.

With reference to the supplement to the complaint of the Nickel Plate, dated April 14, 1960:

1. Interveners admit the allegations in paragraphs I, II, and III.

2. Interveners deny the allegation contained in paragraph IV and, in answer, refer to the answers contained in A1 to A8, inclusive, herein.

C.

With reference to the Second Supplement to Complaint filed by Nickel Plate dated May 4, 1961:

1. Interveners admit the allegations of paragraph I relating to the filing of pleadings, but in the interest of a more complete and accurate statement of facts in so far as the purpose of the six railroads in the finance dockets before the Commission is concerned, refer to the answer made in A2 herein.

2. Interveners deny the allegations in paragraph II relating to alleged deficiencies of applicants' (inter-

veners') requests to the Commission for authority, and admit the allegations of paragraph III and deny the allegations in paragraph IV, and in support of their position refer to section 1, paragraph 19 of the Inter-[fol. 6288] state Commerce Act and the decision of the District Court in *Woodruff* v. *United States*, 40 F. Supp. 949, 953, interpreting said section 1, paragraph 19:

> "Section 1, Par. 19, expressly confers on the I.C.C. power to prescribe 'rules and regulations as to hearings.' And section 20a(6) provides that the Commission 'may hold hearings, if it sees fit, to enable it to determine its decision.' The language quite clearly contemplates that the State authorities shall be consulted, but that hearings shall be had only if the Commission sees fit."

3. Interveners admit the allegations in paragraphs V and VI.

4. Interveners deny the allegation contained in paragraph VII pertaining to alleged deficiencies of the Examiner's reports, orders, and certificates, and refer to the answer set forth in C2 above.

5. Interveners admit the allegation in paragraph VIII.

6. Interveners again deny the allegations incorporated by reference in paragraph IX which were contained in Nickel Plate's complaint and supplement to complaint, and in answer thereto refer to the answers found in part A. Interveners deny the allegation pertaining to the Commission's supplemental report and supplemental certificate of public convenience and necessity and, in answering more specifically the reasons stated in support of such allegation, say:

> (a) Interveners deny the allegations contained in sub-paragraphs 1 and 2, which contend the Commission erroneously approved the supplemental ap-

plications on the basis of evidence introduced at a [fol. 6289] hearing held before the supplemental applications were filed, such evidence consisting of a proposed lease and operating arrangement as to which material issues the protestants were denied prior notice. The interveners deny that the Commission erroneously denied a hearing after the supplemental applications were filed; and deny that the protestants became entitled to a hearing; deny that the Commission had acted prematurely in its report of October 5, 1959; deny that the Commission erred in failing to hold a hearing on the entire plan after the supplements were filed; and deny that the supplemental applications failed to comply with standing rules of the Interstate Commerce Commission. The Commission could see "no need for further hearing or to require the reintroduction into evidence of the same basic testimony and exhibits which were introduced at the original hearing." (Sheet 8, Supplemental Report of the Commission, September 19, 1960.) It must be pointed out that the latter does not consider the entitlement of a party to a formal hearing as a matter of right.

(b) In answer to sub-paragraph 3, interveners deny the allegations set forth therein that the Commission erroneously approved the supplemental applications on the basis of a prejudgment of the lease and joint facilities. The Commission held that all of the applicants' documents, however entitled, are in fact and will be construed as supplemental applications under section 1(18) of the Act for extensions of their respective lines of railroad.

(c) Interveners deny the allegations set forth in sub-paragraph 4, alleging that the Commission erroneously relied on a record made three years previously and on findings made on such record one year

previously without evidence circumstances previously testified to still prevailed. They point out that no [fol. 6290] offer was made by the plaintiff to show in its petitions for reconsideration filed with the Commission that evidence would be offered which was anything but cumulative.

(d) Interveners deny the allegation contained in sub-paragraph 5, alleging that the applicants do not have authority to file the new applications; deny that there is no evidence that the Chicago Regional Port District will execute the lease submitted with the supplemental applications; deny that the applicants have not offered evidence as to the amount of rental to be paid under the lease or that the traffic would be compensatory; and refer to the exhibits of record showing the rental to be paid and the return to questionnaire filed with the Commission and the testimony of record before the Commission showing that the traffic to be handled would be compensatory.

(e) Interveners deny the allegation contained in sub-paragraph 6, alleging that the Commission erroneously approved the applications and supplement to applications without requiring the applicants to fulfill their burden of proof and by approving the original and supplemental applications piecemeal without a full and complete hearing on the entire plan for service, and refer to the record, if and when presented to the Court, to show that the Commission found the applicants had fulfilled their burden of proof after a full and complete hearing.

7. Interveners deny that plaintiff will be irreparably damaged if said reports, orders, and certificates of public convenience and necessity, as corrected and supplemented, are not permanently suspended, enjoined, set aside, and annulled. Nickel Plate is in no different position than interveners regarding their au-

[fol. 6291] thority to serve the facilities of the Chicago Regional Port District, and refer to the answer made in A6 herein.

Interveners, having answered, pray that the complaint, supplement to the complaint, and second supplement to the complaint herein may be dismissed.

Respectfully submitted,

William J. O'Brien, Jr., Robert H. Bierma, Richard T. Cubbage, Franklin C. Gagen, Martin J. Keating, John C. Lawyer, Richard O. Olson, Edmund A. Schroer, Joseph H. Wright, Attorneys for Interveners.

W. A. Wilkinson, 1324 West Third Street, Cleveland 13, Ohio, of Counsel.

135 East Eleventh Place, Chicago 5, Illinois.

[fol. 6292] Certificate of Service (omitted in printing).

[fol. 6293] [File endorsement omitted]

[fol. 6294]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

ANSWER OF INTERVENERS, ILLINOIS CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY AND INDIANA HARBOR BELT RAILROAD COMPANY TO COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY AND SUPPLEMENT TO AND SECOND SUPPLEMENT TO SAID COMPLAINT—Filed June 12, 1961

Answering the complaint and supplements thereto herein, the Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago, South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The Michigan Central Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad [fol. 6295] Company (hereinafter designated jointly as "interveners"), who have been permitted to intervene as defendants and parties in opposition to the complaints, respectfully say:

A.

With reference to the initial complaint filed by the Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company (hereinafter referred to jointly as Rock Island):

1. Interveners admit the allegations of paragraphs 1, 2, and 3.

2. Answering paragraphs 4 and 5 of the complaint dealing with the physical description and development of Lake Calumet and the facilities located on the property of the Chicago Regional Port District and with the expenditures made by the District, interveners deny that the allegations therein fairly or correctly set forth the evidence before the Commission and ask leave to refer to the record of such evidence if and when presented to the Court.

3. Answering paragraph 6 of the complaint dealing with the applications filed by interveners with the Interstate Commerce Commission, and dealing with the efforts of Rock Island to contest such applications, interveners deny that the allegations therein fairly or correctly set forth the contents of the applications, the pleadings, or evidence of record before the Commission, and ask leave to refer to the applications and the evidence of record as well as the pleadings before the Commission if and when presented to the Court.

4. Interveners admit, as set forth in paragraph 7, that the applications were filed under Sections 1(18) and 5(2) of the Interstate Commerce Act.

5. Answering paragraph 8 and subparagraphs A to K of the complaint alleging error by the Commission, inter- [fol. 6296] veners deny the allegations that the Commission's report, certificate, and orders were guided by a misinterpretation of national policy, contravened the legislative intent and purpose of the Interstate Commerce Act, contravened the National Transportation Policy, misapplied

the law, ignored judicial and Commission precedent, and applied improper legal yardstick as to public convenience and necessity and in addition, refer to the report and order proposed by the hearing examiner and the report and order of the Commission, which fairly and accurately set forth the findings of said examiner and Commission, and refer to the record before the Commission if and when presented to the Court, which support such findings. Interveners say the Commission's report, certificate, and orders have their foundation in and are fully supported by the evidence presented to the Commission. Interveners further say there was no abuse of discretion; that the Commission conducted a full and fair hearing upon interveners' applications, at which hearing plaintiffs had full opportunity to contest the applications and present evidence to support their opposition.

Interveners further say that the record and the arguments of the parties were fully and thoroughly considered by an examiner of the Commission and thereafter were thoroughly considered by the Commission itself; that the Commission found that approval of the applications would result in greater rail competition, better service, greater car supply, and lower rates for the industries on Port District property at Lake Calumet Harbor; that the Commission further found additional rail service is required for the future development of the industries now or hereafter to be located there and that it would be a detriment and a hindrance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are [fol. 6297] available and anxious to serve the port; and that, although the port is now served by approximately 100 common-carrier truck lines and although there is no restriction on the number of barges and ships permitted to serve the port, the Rock Island is the only railroad presently serving the port.

Interveners further say that, in so far as the allegations of error contained in the complaint are concerned, the

Commission made no error of fact or law of which plaintiffs could justly complain. Although the interveners established proof that the present and future public convenience and necessity warranted their operation into the Port District and although interveners had, in their applications and returns to questionnaire as well as in their testimony at the hearing, made clear their intent to serve within the Port District and upon the Port District's tracks, the Commission found that interveners should file supplements to their applications specifically asking for authority to operate over the tracks of the Chicago Regional Port District. Interveners filed such supplements to their applications although they believed and contended that their original applications and returns to questionnaire were sufficiently broad to include such a request.

Answering and denying paragraphs 9, 10, and 11, alleging errors in fact and in law in the report and order of the Commission dated October 5, 1959, and alleging irreparable injury and damage of the plaintiffs, and deprivation of rights and protection afforded to plaintiffs by the laws of the United States, interveners asked leave to refer to the evidence before the Commission, the report, and orders of the Commission if and when presented to the Court.

Interveners deny the allegations set forth in subparagraphs L and M of paragraph 8, and refer to the pleadings filed with the Commission not only by Rock Island but [fol. 6298] by Nickel Plate*, which include initial briefs, exceptions to the examiner's proposed report and petitions for reconsideration of the Commission's report and order to illustrate the fact that there was no abuse of discretion by the Commission, that Rock Island and Nickel Plate were afforded every opportunity to present evidence and to point up any alleged error in law or fact by the examiner or the full Commission. The initial report and order and the order on reconsideration by the Commission, with but

* The New York, Chicago, and St. Louis Railroad Company, referred to as "Nickel Plate," is co-plaintiff herein. Answer to its complaint is already on file.

one dissent in each instance, weighs heavily against such allegations.

With reference to the Supplement to the Complaint filed by Rock Island, dated April 26, 1960:

1. Interveners admit the allegations of paragraphs I, II, and III of the Supplement to the Complaint.

2. Interveners admit the allegations of the portion of paragraph IV relating to the filing by Rock Island with the Interstate Commerce Commission of their answer and protest, in which they oppose approval of the supplements to the applications filed by the interveners with the Commission; but deny that portion of paragraph IV alleging that the documents filed by applicants (interveners) do not make clear whether they are supplements or amendments to the original applications or new applications. The Commission held that all of the applicants' documents, however entitled, are in fact and will be construed as supplemental applications under section 1(18) of the Act for extensions of their respective lines of railroad.

3. Answering paragraph V, in which Rock Island again alleges error by the Commission, interveners again refer to the answers made in A5 herein and in addition refer to the report and order proposed by the hearing examiner and the report and order of the Commission, which fairly and accurately set forth the findings of said examiner and Commission, and refer [fol. 6299] to the record before the Commission, if and when presented to the Court, which support such findings.

4. Answering paragraph VI, referring to documents filed with the Commission, interveners, not having received copies of appendices A, B, and C, must presume appendices A, B, and C are copies of supplements to the application of applicants (interveners) filed with the Commission and point out that said supplements were filed at the request of and with the

Commission to cure an alleged technical defect in the original applications.

With reference to the Second Supplement to Complaint of Rock Island dated May 12, 1961:

1. Interveners deny the allegation contained in paragraph I, contending that the Commission's refusal to hold a second hearing had deprived the plaintiffs of property without due process of law, and deny that the action of the Commission in granting the applications was without full prior compliance with the Interstate Commerce Act. The Commission could see "no need for further hearing or to require the reintroduction into evidence of the same basic testimony and exhibits which were introduced at the original hearing." (Sheet 8, Supplemental Report of the Commission, September 19, 1960.) It must be pointed out that the law does not consider the entitlement of a party to a formal hearing as a matter of right.

2. Interveners deny the allegations contained in paragraph II, contending that the order of the Commission of April 18, 1961, which denied the petitions of Rock Island and Nickel Plate for reconsideration of the Commission's supplemental report and certificate dated September 19, 1960, and for further oral argument, is invalid in that it fails to set forth a statement of findings and conclusions as is allegedly required by section 8 of the Administrative Procedure Act (5 U.S.C. 1007) and section 14(1) of the Interstate Commerce Act, and point out that section 14(1) governs the action of the Commission with respect to reports issued following a hearing, but does not apply to orders issued [fol. 6300] by the Commission in response to petitions for rehearing or reconsideration which are addressed to the discretion of the Commission as provided in section 17(6) of the Interstate Commerce Act with which provisions the Commission is in full compliance in the

instant proceedings. Interveners also deny the allegation that the evidence proffered by Rock Island in its petition for reconsideration was other than cumulative.

3. Interveners deny the allegation contained in paragraph III that the Commission flouted public convenience and necessity and respectfully refer to the initial and supplemental orders of the Commission in which the grant of authority was based upon the principle of public convenience and necessity.

4. Interveners deny the allegations set forth in paragraph IV, that the report and order of September 19, 1960, and order of April 18, 1961, are erroneous, unsupported by the record, constitute an abuse of discretion, and are unlawful, arbitrary, capricious, and null and void; and further deny as unfounded the alleged reasons set forth in subparagraph A, that the Commission based its conclusion that the "new" applications should be granted upon its approval of a proposed lease of Port District tracks which had never been discussed with the Port District and would never be executed by the District. Complainants' characterization of the applications as "new" is erroneous, as it was clearly pointed out by the Commission in its supplemental report, "All of the applicants' documents, however entitled, are in fact, and will be construed, as supplemental applications under Section 1(18) of the Act for extensions of their respective lines of railroad." Recourse to the record will show that the lease in question was the subject of extended discussions between the District and interveners and that an agreement was reached and the lease will be executed. Interveners deny as unfounded the alleged reasons set forth in subparagraphs B and E, and refer to the answer made in A3 and A6 herein. Interveners deny as unfounded the alleged reasons set forth in subparagraphs C, D, and F, and refer to the answer made in A6 herein.

[fol. 6301] 5. Interveners, in answering paragraph V, refer to the answers made in A and B herein.

Therefore, having answered, interveners pray that the complaint herein may be dismissed.

Respectfully submitted,

Illinois Central Railroad Company, By William J. O'Brien, Jr., Joseph H. Wright, Its Attorneys;

The Pennsylvania Railroad Company, By Robert H. Bierma, Its Attorney;

Chicago South Shore and South Bend Railroad, By Edmund A. Schroer, John C. Lawyer, Its Attorneys;

The Belt Railway Company of Chicago, By Richard T. Cubbage and Franklin C. Gagen, Its Attorneys;

The Michigan Central Railroad Company, The New York Central Railroad Company, Indiana Harbor Belt Railroad Company, By Martin J. Keating and Richard O. Olson, Their Attorneys.

W. A. Wilkinson, 1324 West Third Street, Cleveland 13, Ohio, Of Counsel.

[fol. 6301a]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

ANSWER OF CALUMET HARBOR TERMINALS, INC., NORTH PIER TERMINAL COMPANY AND SEAWAY STEVEDORING CO. INC.—Filed June 14, 1961

Calumet Harbor Terminals, Inc., North Pier Terminal Company and Seaway Stevedoring Co. Inc., intervening defendants, answer the complaints herein by adopting as their own, the joint answers filed in this proceeding by the United States of America and the Interstate Commerce Commission, defendants.

Wherefore, defendants pray that the relief sought be denied and that the complaints be dismissed.

Charles B. Myers, W. A. Wilkinson.

Burchmore, Good & Bobinette, 2106 Field Building, Chicago 3, Illinois, Of Counsel.

W. A. Wilkinson, 1324 W. Third Street, Cleveland 13, Ohio.

[File endorsement omitted]

[fol. 6301c] Certificate of Service (omitted in printing).

[fol. 6302]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

Interveners

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation and PULLMAN RAILROAD COMPANY, a corporation, Plaintiffs,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

THIRD SUPPLEMENT TO COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, PULLMAN RAILROAD COMPANY—Filed September 28, 1961

[fol. 6303] Now Come plaintiffs Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, and complaining of the above-named defendants, further allege:

I.

In the supplement to complaint filed by these plaintiffs on April 26, 1960, and in the second supplement to complaint filed by these plaintiffs on May 12, 1961, facts rela-

[File endorsement omitted]

tive to the filing of new applications with the Interstate Commerce Commission by the applicants were set forth in detail.

In addition to the authority sought in the new applications, the applicants asked approval of a proposed contract with the Chicago Regional Port District (hereinafter sometimes called "Port District") covering the operation by the applicants upon tracks owned by the Port District.

The Commission approved the proposed contract in its report and order of September 19, 1960, notwithstanding the fact that these plaintiffs disclosed to the Commission in their request for a hearing on the new applications, that the proposed contract had not been discussed with the Port District and would not be executed by the Port District. These plaintiffs in their second supplement to complaint stated that the Commission refused in its latest order, the order of April 18, 1961, to modify its order of September 19, 1960, thus abusing its discretion and violating the rights of these plaintiffs in that the Commission's order of September 19, 1960, granting the authority (to operate on the tracks of the Port District) sought in the new applications, was based upon approval by the Commission of a contract which did not and would not exist.

II.

On July 31, 1961, counsel for the applicants (intervening defendants in this cause), addressed a letter to the Secre- [fol. 6304] tary of the Commission, with which letter was submitted for the Commission's file a conformed copy of an "Agreement For The Non-Exclusive Use Of The Chicago Regional Port District's Railroad Tracks And Facilities", between the Chicago Regional Port District and the applicants. A copy of said letter of July 31, 1961, is attached hereto as Appendix A. A conformed copy of the "Agreement For The Non-Exclusive Use Of The Chicago Regional Port District's Tracks And Facilities" is attached hereto as Appendix B.

The Commission in its report and order of September 19, 1960, stated on page 11:

> "Any changes in the terms or provisions of the lease subsequently made by the parties, or further modification, contrary to the contention of the protestants, would require our prior approval and authorization."

The last paragraph of said letter of July 31, 1961, reads "This contract conforms with the changes specified by the Commission in its report and order dated October 5, 1959, and its supplemental report and order dated September 19, 1960.

III.

The Commission replied to the applicants' letter on August 8, 1961. A copy of said letter of August 8, 1961, is attached hereto as Appendix C.

IV.

The new contract submitted by the applicants to the Commission, Appendix B hereto, differs from the contract approved by the Commission in many material respects. In order that the statement by the applicants should not remain unrefuted, these plaintiffs, by their letter of August 9, 1961, to the Commission, stated the facts. A copy of said letter is attached hereto as Appendix D. The Commission's letter of August 8, 1961, and the Rock Island-Pullman letter of August 9, 1961, crossed in the mail.

[fol. 6305]

V.

The Commission replied to the Rock Island's letter on August 16, 1961. A copy of the Commission's letter of August 16, 1961, is attached hereto as Appendix E.

VI.

The conformed copy of the contract between the Port District and the applicants, Appendix B, proves the truth

of the allegations of these plaintiffs contained in the second supplement to complaint that the contract approved by the Commission in its order of September 19, 1960, was not acceptable to the Port District, that the Commission approved a contract which would not be executed and that the Commission committed error in so approving said contract.

VII.

These plaintiffs do not change or modify in any respect the bases or prayers for relief contained in the complaint, as heretofore supplemented, filed by these plaintiffs with this court.

Wherefore, these plaintiffs pray that the relief prayed in their complaint, as heretofore supplemented, be granted.

Respectfully submitted,

Edwin Knachel, 1706 Union Commerce Building, Cleveland 14, Ohio;

Bruce Dwinell, T. E. Desch, 1025 LaSalle Street Station, Chicago 5, Illinois;

Joseph B. Fleming, John L. Bordes, Kirkland, Ellis, Hodson, Chaffetz & Masters, Prudential Plaza, Chicago 1, Illinois;

John Guandolo, 1120 Connecticut Avenue, N.W., Washington 6, D. C., Attorneys for Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company, Interveners.

[fol. 6320]

CLERK'S NOTE

APPENDIX C TO THIRD SUPPLEMENT TO COMPLAINT

"Letter from Director, I.C.C. to Illinois Central, dated August 8, 1961" is omitted from the record here. It is printed at pages 442-443 supra.

[fol. 6321]

CLERK'S NOTE

APPENDIX D TO THIRD SUPPLEMENT TO COMPLAINT

"Letter from Rock Island to Secretary, I.C.C. dated August 9, 1961" is omitted from the record here. It is printed at pages 443-446 supra.

[fol. 6325]

CLERK'S NOTE

APPENDIX E TO THIRD SUPPLEMENT TO COMPLAINT

"Letter from Director, I.C.C. to Rock Island dated August 16, 1961" is omitted from the record here. It is printed at pages 447-448 supra.

[fol. 6326] [File endorsement omitted]

[fol. 6327]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

ANSWER OF INTERVENERS, ILLINOIS CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY AND INDIANA HARBOR BELT RAILROAD COMPANY TO THIRD SUPPLEMENT TO COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY—Filed October 19, 1961

Answering the third supplement to the complaint herein, the Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago, South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The Michigan Central Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company (hereinafter designated jointly as "interveners"), who have been permitted to intervene as defendants and parties in opposition to the complaints, respectfully say:

[fol. 6328]

I.

Answering paragraph I of the third supplement to the complaint dealing with the filing by applicants (interveners) of supplements to applications with the Interstate Commerce Commission, interveners deny that the allegations

therein fairly or correctly set forth the contents of the supplements to applications and ask leave to refer to said supplements to applications before the Commission if and when presented to the Court.

II.

Answering paragraph I dealing with the approval by the Commission of the proposed contract in the Commission's report and order of September 19, 1960, interveners deny the allegations alleging that the proposed contract had not been discussed with the Port District and would not be executed by the Port District, and ask leave to refer to the executed contract if and when presented to the Court.

III.

Answering paragraph I dealing with the allegation made by plaintiffs in their second supplement to complaint, interveners ask leave to refer to the answer previously made by interveners and filed with this Court.

IV.

Interveners admit the allegations contained in paragraph II that counsel for applicants addressed a letter to the Secretary of the Commission enclosing a conformed copy of an "Agreement For The Non-Exclusive Use of The Chicago Regional Port District's Railroad Tracks and Facilities," between the Chicago Regional Port District and the applicants. Interveners also admit that the Commission, in its report and order of September 19, 1960, stated:

> [fol. 6329] "Any change in the terms or provisions of the lease subsequently made by the parties, or further modification, contrary to the contentions of the protestants, would require our prior approval and authorization,"

and say that a more complete quotation of the finding of the Commission would include that portion of the paragraph immediately preceding, viz.:

"We find that the lease agreement, as amended, is reasonable and adequate to accomplish the purpose for which it is intended. Whether the lease will be finally executed by the parties is for their determination and there is no indication by the parties that such lease would not be executed."

Interveners ask leave to refer to the report and order of September 19, 1960, of the Interstate Commerce Commission if and when presented to the Court.

V.

Answering paragraph III, interveners admit that the Commission replied to applicant's letter on August 8, 1961, a copy of which is attached to the third supplement to the complaint as "Appendix C."

VI.

Answering paragraph IV, interveners deny the allegations contained therein, alleging that the contract submitted by the applicants to the Commission differs from the contract approved by the Commission in many material respects, and ask leave to refer to both contracts if and when presented to the Court. Interveners deny the allegations set forth in plaintiffs' letter of August 9, 1961, to the Commission, attached to the third supplement to the complaint as "Appendix D," and ask leave to refer to both contracts if and when presented to the Court.

VII.

Answering paragraph V, interveners admit the Commission replied to the Rock Island's letter on August 16, 1961.

[fol. 6330] VIII.

Answering paragraph VI of the third supplement to the complaint, alleging that the contract approved by the Commission in its order of September 19, 1960, was not accept-

able to the Port District, that the Commission approved a contract which would not be executed, and that the Commission committed error in so approving said contract, and again ask leave to refer to both contracts and to the supplemental order of the Commission of September 19, 1960, if and when presented to the Court.

IX.

In answering paragraph VII, pertaining to the prayers for relief contained in the original complaint and supplements thereto, interveners refer to the answer and reply made to such complaints and supplements thereto which have been filed with this Court.

Therefore, having answered, interveners pray that the complaint and the supplements herein may be dismissed.

Respectfully submitted,

Illinois Central Railroad Company, By William J. O'Brien, Jr., Joseph H. Wright, Its Attorneys;

The Pennsylvania Railroad Company, By Robert H. Bierma, Its Attorney;

Chicago South Shore and South Bend Railroad, By Edmund A. Schroer, John C. Lawyer, Its Attorneys;

The Belt Railway Company of Chicago, By Richard T. Cubbage and Franklin C. Gagen, Its Attorneys;

The Michigan Central Railroad Company, The New York Central Railroad Company, Indiana Harbor Belt Railroad Company, By Richard O. Olson, Their Attorney.

John F. Dolan, 1324 West Third Street, Cleveland 13, Ohio, Of Counsel.

[fol. 6331] Certificate of Service (omitted in printing).

[fol. 6333] [File endorsement omitted]

[fol. 6334]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

THIRD SUPPLEMENT TO COMPLAINT—March 29, 1963

I.

On April 4, 1960 the plaintiff, The New York, Chicago and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate"), filed its complaint in above entitled proceeding against the United States of America and the Interstate Commerce Commission for the purpose of suspending, enjoining, setting aside and annulling the report, order and certificate, as corrected, of the Interstate Commerce Commission in various finance dockets before said Commission as enumerated in detail in said complaint. All of said finance dockets relate to the effort of six railroads to institute railroad service in the Lake Calumet area, Cook County, Illinois.

On April 14, 1960 Nickel Plate filed a supplement to said complaint and on May 4, 1961 a second supplement to said complaint, which supplements set forth events in the proceedings before the Interstate Commerce Commission up to and through April 25, 1961. In addition, said supplements repeated and incorporated by reference allegations contained in previous documents filed with this Court and

added additional allegations as to errors and deficiencies [fol. 6335] in the reports and orders of the Interstate Commerce Commission. The purpose of this third supplement to complaint is to set forth the essential facts which have transpired in said proceeding before the Interstate Commerce Commission since April 25, 1961 up to and including March 25, 1963, as well as to assert additional errors by the Commission in said proceedings.

II.

On July 31, 1961 the applicants before the Interstate Commerce Commission sent to that Commission a further and modified agreement dated June 12, 1961 with the Chicago Regional Port District. This agreement related to the rights, terms and obligations of the occupany of the Port District tracks by the applicants and required, prior to applicants' occupancy of said tracks, approval by the Port District of the proposed operating arrangements by the applicants. Said agreement was not in compliance with the approval and authorization and certificates previously issued by the Interstate Commerce Commission in that the rights and obligations of the parties were substantially changed.

III.

On November 9, 1961 Director V. V. Baker of the Bureau of Finance of the Interstate Commerce Commission advised Mr. William J. O'Brien, Counsel for the applicants, that the agreement of June 12, 1961 required further Commission approval because of the substantial changes therein from the authority previously granted by the Interstate Commerce Commission. A copy of said letter of Director Baker is attached hereto and made a part hereof as Appendix J (Appendices A to G, inclusive, are attached to the original complaint and Appendices H and I are attached to the second supplement to complaint).

IV.

By document dated November 27, 1961, filed December 1, 1961, applicants requested Interstate Commerce Commission approval of the agreement dated June 12, 1961 with the Chicago Regional Port District.

[fol. 6336]

V.

On December 15, 1961 Nickel Plate replied to applicants' request for authority pointing out that the agreement of June 12, 1961 with the Chicago Regional Port District required as a condition precedent to its effectiveness approval by the Port District of a centralized supervision agreement among the applicants as to the method of operating and maintaining the Port District tracks.

VI.

By order dated May 15, 1962, served May 21, 1962, a copy of which order is attached hereto as Appendix K, the Interstate Commerce Commission ordered the applicants to file with said Commission a copy of the aforementioned centralized supervision agreement relating to the method in which applicants would operate and maintain the Port District tracks.

VII.

On May 22, 1962 applicants filed with the Interstate Commerce Commission an unexecuted document represented to be a memorandum of understanding among said applicants as to the method in which they would operate the Port District tracks. Said unexecuted memorandum of understanding had previously been introduced at the hearings in this proceeding held on October 1, 1957 as Exhibit H-29, and did not in any way indicate the approval thereof by the Chicago Regional Port District.

VIII.

On June 7, 1962 Nickel Plate filed its reply to said submission of May 22, 1962 pointing out the aforementioned failure of the Chicago Regional Port District to indicate its consent to the proposed method of operations.

IX.

By order dated August 23, 1962, a copy of which order is attached hereto as Appendix L, the Interstate Commerce Commission ordered the applicants to file a centralized [fol. 6337] supervision agreement among themselves and indicating consent thereto by the Chicago Regional Port District, or in the alternative face entry of an order vacating and setting aside the previous Commission order of September 19, 1960 and facing also denial of the various applications.

X.

On September 25, 1962 the applicants resubmitted in executed form the above mentioned memorandum of understanding indicating thereon the consent of the Chicago Regional Port District. This was the first indication any time in the proceeding that the Chicago Regional Port District approved the proposed method of operation by the applicants, even though the aforesaid document was now dated as of September 4, 1957.

XI.

On October 11, 1962 Nickel Plate filed its reply to applicants' aforementioned submission of September 25, 1962 and pointed out various and further deficiencies of said centralized supervision agreement among the applicants and of the agreement dated June 12, 1961 among the Chicago Regional Port District and the applicants.

XII.

By second supplemental report and order, dated November 26, 1962 and served December 3, 1962, a copy of which report and certificate is attached as Appendix M, the Commission approved the aforementioned centralized supervision agreement among the applicants as well as the agreement of June 12, 1962 among the applicants and Chicago Regional Port District.

XIII.

On December 28, 1962 Nickel Plate filed its petition for reconsideration of said second supplemental report, certificate and order, dated November 26, 1962 of the Interstate Commerce Commission and requested a stay of outstanding orders. In said petition for reconsideration Nickel Plate pointed out numerous errors on the part of the Commission in said report, certificate and order, including an [fol. 6338] incorrect and erroneous finding by the Commission as to the consideration to be paid by the applicants for use and occupancy of the Port District tracks. Attached as Appendix N is copy of aforesaid petition of Nickel Plate setting forth particularly on pages 1-4, inclusive, a summary of the essential history of the entire proceeding up to that date, as well as matters complained of in the Second Supplemental Report of November 26, 1962.

XIV.

By order dated March 18, 1963, served March 25, 1963, a copy of which order is attached as Appendix O, the Interstate Commerce Commission denied Nickel Plate's petition for reconsideration and amended its report of November 26, 1962 as to the consideration to be paid by the applicants for the use and occupancy of Port District tracks.

XV.

Nickel Plate repeats herein and incorporates by reference the allegations contained in its complaint, supple-

ment to complaint, and second supplement to complaint filed herein and asserts that the deficiencies of the reports, certificates and orders of the Interstate Commerce Commission as described in said documents have not been cured or corrected by the Commission's second supplemental report, certificate and order of November 26, 1962, or by the Commission's order of March 18, 1963. In addition Nickel Plate asserts that the Commission's second supplemental report, certificate and order of November 26, 1962, and its order of March 18, 1963 are arbitrary, in abuse of discretion, not in accordance with law, contrary to constitutional right, in excess of statutory jurisdiction and authority, not in observance of procedure required by law, and unsupported by substantial evidence in the following respects and for the following reasons, among others:

1. The Commission has perpetuated its previous errors in failing to hear and decide simultaneously all applications required to effectuate applicants' entire plan to [fol. 6339] serve the Port, contrary to its own statement in the proceeding that "orderly procedure dictates" that all such applications should be heard simultaneously.

2. The Commission failed to hold hearings on the supplemental applications, contrary to the finding in Item 1 above, that hearings should be held on applications. This denied Nickel Plate an opportunity to cross-examine applicants' witnesses and to submit evidence.

3. The Commission failed to require applicants to file appropriate supplemental applications for occupancy and operation of Chicago Regional Port District tracks, which applications should have contained, but did not, information and data required by standing and published rules of the Commission, including among other items the valuation of the property to be occupied and estimated net income from the proposed operations.

4. The Commission decided the supplemental applications on the basis of prejudgments of public convenience and necessity made in 1959 before the supplemental applications were filed or the agreements at issue were entered into. Of necessity, therefore, Nickel Plate was deprived of due notice of the contents of the supplemental applications and agreements subsequently filed.

5. The Commission decided the supplemental applications on stale evidence and on the basis of hearings held in 1957 even though five shipping seasons and the opening of the St. Lawrence Seaway have occurred since 1957.

6. The Commission failed to require the submission of evidence of public convenience and necessity and refused to receive evidence as to the volume of rail traffic actually handled to and from the Port District since 1957. Furthermore, the Commission admitted that it lacked information concerning the future value of the tracks and the volume of traffic anticipated on which the rental would be based.

[fol. 6340] 7. The Commission decided the supplemental applications without evidence that the consideration to be paid by the applicants to the Chicago Regional Port District under the agreement of June 12, 1961 is or would be reasonable. It has refused to require the submission of evidence as to the value of the property occupied under said agreement and the estimated annual amount of rental to be paid by applicants therefor.

8. The Commission, despite continuous objection by Nickel Plate, has never required the applicants to file the agreement or lease (presumably dated April 1, 1957), between the Port District and the Philadelphia, Baltimore & Washington Railroad Company covering

the Port District land on which Pennsylvania would build a portion of the lead track needed to reach the tracks covered by the June 12, 1961 agreement. The result of this is that the record fails to show or provide a basis for computing the total consideration, on a per car basis or otherwise, to be paid by any or all of the applicants for the use and occupancy of Port District property. Furthermore, without such agreement in the record the amount of property encompassed by the agreement of June 12, 1961 is unknown, and the reasonableness of the charge by Pennsylvania for use of said lead track cannot be determined.

9. The Commission improperly delegated its authority to the Chicago Regional Port District unilaterally to change the applicants' proposed method of serving the Port which had been approved by the Commission.

10. The Commission failed to require the applicants to fulfill their statutory burden of proof.

[fol. 6341]

XVI.

Plaintiff will be irreparably damaged if said reports, orders, and certificates of public convenience and necessity, as corrected and supplemented, are not permanently suspended, enjoined, set aside, and annulled, and is without adequate remedy at law.

XVII.

Wherefore, Plaintiff prays, in addition to its prayers for relief as set forth in its complaint and supplements to complaint herein, as follows:

1. That the United States of America and Interstate Commerce Commission be required to file their answer or answers, or other pleadings to the complaint, supplement to complaint, second supplement to complaint,

and the third supplement to complaint filed herein by Nickel Plate.

2. That a Court constituted as required by U.S.C. Title 28, Sections 2284, and 2321-2325, consisting of three judges, of whom at least one shall be a circuit judge, be convened, and that said Court so constituted and convened shall hear said complaint and all supplements thereto upon due and legal notice to defendants;

3. That said Court upon final hearing of this suit, enter a decree herein permanently suspending, enjoining, setting aside, and annulling the said reports, certificates, and orders of the Interstate Commerce Commission and permanently enjoining the Commission from approving said applications and supplements to applications;

4. That Plaintiff have and recover of the defendants the proper costs of this suit; and

5. That Plaintiff have such other and further relief in the premises as to equity may appertain and as may be deemed by this Court fit and proper.

Respectfully submitted,

Thomas O. Broker, Attorney for Plaintiff, The New York, Chicago and St. Louis Railroad Company, 3016 Terminal Tower, P. O. Box 6119, Cleveland 1, Ohio.

Dated: March 29, 1963.

[fol. 6355] [File endorsement omitted]

[fol. 6356]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Interveners

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation and PULLMAN RAILROAD COMPANY, a corporation, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

FOURTH SUPPLEMENT TO COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY—April 3, 1963

I.

In the Third Supplement to Complaint filed in this cause by these plaintiffs, this Court was advised that on July 31, 1961, the applicants (intervening defendants in this cause) presented to the Commission for filing a copy of an "Agreement For The Non-Exclusive Use Of The Chicago Regional Port District's Railroad Tracks and Facilities", dated June 12, 1961, (attached as Appendix B to these plaintiffs' Third

Supplement to Complaint); that these plaintiffs wrote a letter to the Commission (attached as Appendix D to these plaintiffs' Third Supplement to Complaint) calling the attention of the Commission to the fact that the contract with the Port District was different in many respects from the form of contract approved by the Commission in its report and order of September 19, 1960; and that the new contract was not actually in effect and did not represent a [fol. 6357] complete agreement between the applicants and the Port District because the contract provided (in Article III, Section 1) that the contract would not become effective until an agreement covering details of centralized supervision of the operation, maintenance and repair of the tracks, satisfactory to the Port District, had been executed by the applicants. We alleged such an agreement had not been executed.

The contract was received by the Commission and placed in its files, but the Commission notified these plaintiffs that the filing did not constitute approval by the Commission.

II.

On November 9, 1961, the Commission wrote the applicants suggesting that they might wish to file a petition for approval of the "Agreement For The Non-Exclusive Use Of The Chicago Regional Port District's Railroad Tracks And Facilities" above referred to.

III.

On or about November 27, 1961, the applicants filed with the Commission a "Petition For Approval Of An Agreement For The Non-Exclusive Use Of The Chicago Regional Port District's Railroad Tracks And Facilities As Modified."

One of the principal changes in the new contract was the elimination of a provision in the proposed lease, approved in the Commission's order of September 19, 1962, which provided for a ceiling on payments based on the value of

the tracks to be used, although other changes were significant.

IV.

On or about December 7, 1961, these plaintiffs filed a motion with the Commission asking, among other things, that, before these plaintiffs be required to reply to the applicants' petition, the Commission direct the applicants to [fol. 6358] furnish information showing (a) value of present tracks (b) anticipated expenditures for tracks for each of the next five years and (c) anticipated rental payments to the Port District for each of the next five years. The Commission was also asked to have the applicants state the anticipated costs of maintenance of the tracks since this work was to be done by the applicants at their expense. These plaintiffs also requested that the Commission direct the applicants to file copies of the centralized supervision agreement, the execution of which was required before the "Agreement For The Non-Exclusive Use Of The Chicago Regional Port District's Railroad Tracks And Facilities" could become "operative."

On May 15, 1962, the Commission entered an order denying the request for information stating, inter alia, that ". . . the additional information requested is not necessary for a decision . . .", but ordering the applicants to file a copy of the centralized supervision agreement.

On or about May 22, 1962, the applicants, in purported compliance with the Commission's order of May 15, 1962, filed a "submission" in which they referred to Exhibit H-29 which was submitted at the hearing before the Commission. Exhibit H-29 was an unsigned document and merely a proposed contract generally agreed to by the applicants which the Commission referred to in its order of October 5, 1959 as an agreement "in principle".

V.

On or about June 7, 1962, these plaintiffs filed with the Commission a document containing a petition for recon-

sideration of the order of May 15, 1962, a reply to the Petition of Applicants and a request for a hearing.

VI.

On August 23, 1962, the Commission entered an order denying these plaintiffs' petition for reconsideration and request for further hearing but ordering the applicants to [fol. 6359] file, within 30 days, executed copies of the centralized supervision agreement, showing approval by the Port District or face vacation of the previous order of the Commission dated September 19, 1960 and denial of the applications. The applicants complied by filing copies of the executed agreement within 30 days. The centralized supervision agreement was dated September 4, 1957.

VII.

On November 26, 1962, the Commission entered its report and order approving the non-exclusive use agreement with the Port District.

VIII.

On or about December 28, 1962, these plaintiffs filed a petition for reconsideration of the Commission's report and order of November 26, 1962. On March 18, 1963, the Commission entered an order denying reconsideration.

IX.

The order of May 15, 1962, the order of August 23, 1962, the order of November 26, 1962, and the order of March 18, 1963 were erroneous, were not supported by and were contrary to substantial evidence, exceeded the statutory authority of the Commission, stated unwarranted conclusions, constituted an abuse of discretion, deprived these plaintiffs of property without due process of law, failed to consider public convenience and necessity and were unlawful, unreasonable, arbitrary, capricious, null and void for the following reasons:

A.

The Commission, by its order of May 15, 1962 denying the motion of these plaintiffs for information, prior to their filing a reply, deprived these plaintiffs of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States and abused its discretion.

[fol. 6360]

B.

The Commission abused its discretion and failed to consider public convenience and necessity when it held in its order of August 23, 1962, in denying a hearing, that the private convenience of the applicants was more important than public convenience and necessity and deprived these plaintiffs of their property without due process of law.

C.

1. The Commission entered its report and order of November 26, 1962, approving the non-exclusive use agreement, without any information as to the rental to be paid or the relationship of the rental to the value of the property to be used and abused its discretion in so doing.

2. The Commission acted without support of any facts when it stated in its report and order of November 26, 1962 that the changes in the lease approved September 19, 1960, including the elimination of the ceiling on payments, would obviously redound to the benefit of the parties, including the applicants.

3. The Commmission, in its report and order of November 26, 1962, misstated the facts with respect to the elimination of payments for empty cars and acted without support of any facts when it stated that all parties to the non-exclusive use agreement will benefit financially.

4. The Commission, in its report and order of November 26, 1962, abdicated its function of consideration of the reasonableness of the terms of contracts by stating its

policy of approving whatever rent the parties agreed to and by relying on applicants in determining whether the contract was better than the lease. The Commission misstated the contents of the original lease and of the non-exclusive use agreement in making the comparison. The Commission did not use expertise in deciding the issue.

[fol. 6361]

D.

The Commission failed to insist that the applicants file necessary applications for the use of additional yards since the proposed use of the Port District's yards will not be adequate. The Commission has repeated its error of committing itself to the approval of future necessary applications.

E.

The order of March 18, 1963, denying these plaintiffs' petition for reconsideration is invalid in that it fails to set forth a statement of findings and conclusions as well as the reasons or basis for the Commission's decision upon all the material issues of fact and law presented in plaintiffs' petition for reconsideration of the report, order and certificate of the Commission dated November 26, 1962, as required by Section 8 of the Administrative Procedure Act (5 U.S.C. 1007) and Section 14(1) of the Interstate Commerce Act (49 U.S.C. 14). Except for a brief discussion of a change which the Commission made in a paragraph of its report and order dated November 26, 1962 dealing with rental payments under the non-exclusive use agreement, the order of March 18, 1963 merely denies plaintiffs' petition for reconsideration and argument on the ground that there has been presented no error of fact or law and that the decision of the Commission is based on adequate findings of fact supported by the record. In fact, however, the Commission carried forward into the modified paragraph the same mistake which it made in the original paragraph included in its order of November 26, 1962. By Section 8 of the Adminis-

trative Procedure Act and Section 14(1) of the Interstate Commerce Act, plaintiffs are entitled to more than this stereotyped language.

Wherefore, these plaintiffs pray, in addition to the relief prayed for in their original complaint, as supplemented:

[fol. 6362] (1) That this Court, upon final hearing of this action, enter a decree herein permanently suspending, enjoining, setting aside and annulling the reports, orders and certificates of May 15, 1962, August 23, 1962, November 26, 1962 and March 18, 1963 of the Interstate Commerce Commission and permanently enjoining the Commission from approving the applications and supplements to applications filed by the applicants.

(2) That plaintiffs be granted such other and further relief as may be just and equitable.

Respectfully submitted,

Edwin Knachel, 1190 Union Commerce Building, Cleveland 14, Ohio;

Bruce Dwinell, T. E. Desch, 1025 LaSalle Street Station, Chicago 5, Illinois;

Joseph B. Fleming, John L. Bordes, Kirkland, Ellis, Hodson, Chaffetz & Masters, Prudential Plaza, Chicago 1, Illinois, Attorneys for Chicago, Rock Island and Pacific Railroad Company, and Pullman Railroad Company, Interveners.

[fol. 6363] [File endorsement omitted]

[fol. 6364]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

-v-

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ANSWER OF INTERVENERS, ILLINOIS CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY AND INDIANA HARBOR BELT RAILROAD COMPANY TO THIRD SUPPLEMENT TO COMPLAINT OF NEW YORK, CHICAGO, AND ST. LOUIS RAILROAD COMPANY—Filed May 1, 1963

Answering the third supplement to the complaint herein, the Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago, South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The Michigan Central Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company (hereinafter designated jointly as "interveners"), [fol. 6365] who have been permitted to intervene as defendants and parties in opposition to the complaints, respectfully say:

With reference to the third supplement to the complaint filed by the New York, Chicago and St. Louis Railroad Company (hereinafter referred to as "Nickel Plate"):

I.

Interveners admit the allegations contained in Paragraph I, but deny there are errors or deficiencies in the reports and orders of the Interstate Commerce Commission.

II.

Interveners admit the allegations contained in the first two sentences in Paragraph II, but deny the allegation contained in the third sentence in Paragraph II.

III.

Interveners deny that the allegations contained in Paragraph III fairly or correctly set forth the contents of the letter marked "Appendix J" to the third supplement to the complaint and ask leave to refer to the letter of November 9, 1961 from Director V. V. Baker of the Bureau of Finance.

IV.

Interveners admit the allegations contained in Paragraphs IV, V, VI, VII, VIII, and IX.

V.

Interveners admit the allegations contained in Paragraph X relating to their filing the executed memorandum of understanding among interveners, applicants before the Com- [fol. 6366] mission, reflecting approval of the Chicago Regional Port District. Interveners deny the allegation contained in Paragraph X alleging this was the first indication any time in the proceedings that the Port District approved the proposed method of operation and in the interest of a more complete and accurate statement of the facts refer to the record in the proceedings before the Commission containing the testimony of a representative of the Port District.

VI.

Interveners admit the allegations contained in Paragraphs XI, XII, XIII, and XIV.

VII.

Interveners deny the allegations set forth in Paragraphs XV and XVI.

VIII.

Further answering the allegations contained in the complaints, interveners deny that the action of the Commission challenged therein is unlawful for the reasons specified, or for any other reason whatsoever. Interveners aver that the action of the Commission is fully supported and justified by the record and is valid and lawful in all respects. Except as herein expressly admitted, interveners deny each and every allegation contained in the complaints.

[fol. 6367] Wherefore, interveners pray that the relief sought be denied, and that the complaints be dismissed with costs.

Respectfully submitted,

Illinois Central Railroad Company, By William J. O'Brien, Jr., Joseph H. Wright, Its Attorneys;

The Pennsylvania Railroad Company, By Robert H. Bierma, Its Attorney;

Chicago, South Shore and South Bend Railroad, By Edmund A. Schroer, John C. Lawyer, Its Attorneys;

The Belt Railway Company of Chicago, By Richard T. Cubbage and Franklin C. Gagen, Its Attorneys;

The Michigan Central Railroad Company, The New York Central Railroad Company, Indiana Harbor Belt Railroad Company, By Richard O. Olson, Their Attorney.

John F. Dolan, 1324 West Third Street, Cleveland 13, Ohio, Of Counsel.

[fol. 6368] Certificate of Service (omitted in printing).

[fol. 6369] [File endorsement omitted]

[fol. 6370]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ANSWER OF INTERVENERS, ILLINOIS CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, CHICAGO, SOUTH SHORE AND SOUTH BEND RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY AND INDIANA HARBOR BELT RAILROAD COMPANY TO FOURTH SUPPLEMENT TO COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY—Filed May 2, 1963

Answering the fourth supplement to the complaint herein, the Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago, South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The Michigan Central Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company (hereinafter designated jointly as "interveners"),

who have been permitted to intervene as defendants and parties in opposition to the complaints, respectfully say:

With reference to the fourth supplement to the complaint filed by the Chicago, Rock Island and Pacific Railroad Com- [fol. 6371] pany (hereinafter referred to as "Rock Island"):

I.

Interveners admit the allegations contained in Paragraph I relating to their filing with the Commission an agreement covering details relating to the supervision of the operation and maintenance and repair of the tracks of the Port District; but deny the further allegations contained in Paragraph I and in the interest of a more complete and accurate statement of the facts refer to the record in the proceedings before the Commission.

II.

Interveners admit the allegations contained in Paragraph II.

III.

Interveners admit the first sentence contained in Paragraph III, but deny the allegations contained in the second sentence contained in Paragraph III alleging that significant changes were contained in the agreement filed November 27, 1961.

IV.

Interveners admit the allegations contained in Paragraphs IV, V, VI, VII, and VIII of the complaint.

V.

Interveners deny the allegations contained in Paragraph IX of the complaint.

VI.

Further answering the allegations contained in the complaints, interveners deny that the action of the Commission [fol. 6372] challenged therein is unlawful for the reasons specified, or for any other reason whatsoever. Interveners aver that the action of the Commission is fully supported and justified by the record and is valid and lawful in all respects. Except as herein expressly admitted, interveners deny each and every allegation contained in the complaints.

Wherefore, interveners pray that the relief sought be denied, and that the complaints be dismissed with costs.

Respectfully submitted,

Illinois Central Railroad Company, By William J. O'Brien, Jr., Joseph H. Wright, Its Attorneys;

The Pennsylvania Railroad Company, By Robert H. Bierma, Its Attorney;

Chicago, South Shore and South Bend Railroad, By Edmund A. Schroer, John C. Lawyer, Its Attorneys;

The Belt Railway Company of Chicago, By Richard T. Cubbage and Franklin C. Gagen, Its Attorneys;

The Michigan Central Railroad Company, The New York Central Railroad Company, Indiana Harbor Belt Railroad Company, By Richard O. Olson, Their Attorney.

John F. Dolan, 1324 West Third Street, Cleveland 13, Ohio, Of Counsel.

[fol. 6373] Certificate of Service (omitted in printing).

[fol. 6374]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY and PULLMAN RAILROAD COMPANY, Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

ILLINOIS CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, INDIANA HARBOR BELT RAILROAD COMPANY, CALUMET HARBOR TERMINALS, INC., NORTH PIER TERMINAL COMPANY, AND SEAWAY STEVEDORING CO., INC., Intervening Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO THIRD SUPPLEMENT TO COMPLAINT OF THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY—Filed April 29, 1963

Come now the United States of America and the Interstate Commerce Commission, defendants, having previously answered the complaint, supplement to complaint, and second supplement to complaint of the New York, Chicago

[File endorsement omitted]

and St. Louis Railroad Company, and for answer to the third supplement to that complaint herein say:

[fol. 6375]

I.

Defendants admit the allegations in paragraph I of the third supplement to the complaint, except deny that there are errors and deficiencies in the reports and orders of the Interstate Commerce Commission.

II.

Answering the allegations in paragraph II of the third supplement to the complaint, defendants admit that on July 31, 1961, the applicants sent to the Commission the modified agreement referred to which differed to some extent from the terms of the previously approved proposed lease agreement.

III.

Answering the allegations in paragraph III of the third supplement to the complaint, defendants admit that by letter dated November 9, 1961, Director Baker of the Commission's Bureau of Finance advised applicants' counsel that in his opinion there were certain "substantive changes" in the agreement which would require approval of the Commission, but deny that Director Baker's letter characterized the changes as being "substantial" as plaintiff here alleges.

IV.

Defendants admit the allegations in paragraphs IV, V and VI of the third supplement to the complaint.

V.

Defendants deny the allegations in the first sentence of paragraph VII of the third supplement to the complaint, and aver applicants filed on May 24, 1962, a document en-

titled "Submission In Compliance With The Commission's Order Dated May 15, 1962," stating their belief that compliance with the order could be achieved by reference to por-
[fol. 6376] tions of the record, including the Exhibit H-29 introduced in evidence as alleged in the second sentence of paragraph VII.

VI.

Defendants admit the allegations in paragraphs VIII, IX and X of the third supplement to the complaint, except deny the allegation in paragraph X that this "was the first indication any time in the proceeding" of Port District approval of the proposed method of operation.

VII.

Defendants admit the allegations in paragraph XI to the extent that Nickel Plate alleged deficiencies in the referred to agreement.

VIII.

Answering the allegations of paragraph XII of the third supplement to the complaint, defendants admit that the Commission approved the modified lease agreement of June 12, 1962; deny that the Commission "approved" the centralized supervision agreement; aver that the Commission held the centralized supervision agreement does not in itself require the Commission's approval and authorization, but its provisions must be considered as part of the terms and conditions of the modified lease agreement; and, respectfully refer the Court to the Commission's report and order of November 26, 1962 (Appendix M to third supplement to complaint) for a full and complete statement of the Commission's findings and reasons therefor.

IX.

Answering the allegations in paragraph XIII, defendants admit that Nickel Plate filed, as alleged, the petition re-

ferred to and attached to the third supplement to complaint as Appendix N.

X.

Defendants admit the allegations in paragraph XIV of the third supplement to the complaint.

[fol. 6377]

XI.

Plaintiffs deny the allegations in paragraph XV and XVI of the third supplement to the complaint.

XII.

Further answering the allegations contained in the third supplement to complaint, defendants deny that the action of the Commission challenged therein is unlawful for the reasons specified, or for any other reason whatsoever. Defendants aver that the action of the Commission is fully supported and justified by the record and is valid and lawful in all respects. Except as herein expressly admitted, defendants deny each and every allegation contained in the third supplement to the complaint.

Wherefore, defendants pray that the relief sought be denied, and that the complaints be dismissed with costs.

Robert W. Ginnane, General Counsel, Robert S. Burk, Attorney, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission;

Lee Loevinger, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.; Merle M. McCurdy, United States Attorney, Cleveland, Ohio, Attorneys for the United States of America.

[fol. 6378]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY and PULLMAN RAILROAD COMPANY, Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

ILLINOIS CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, INDIANA HARBOR BELT RAILROAD COMPANY, CALUMET HARBOR TERMINALS, INC., NORTH PIER TERMINAL COMPANY, and SEAWAY STEVEDORING CO., INC., Intervening Defendants.

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO THIRD AND FOURTH SUPPLEMENTS TO JOINT COMPLAINT OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY, INTERVENING PLAINTIFFS—Filed April 29, 1963

Come now the United States of America and the Interstate Commerce Commission, defendants, having previously answered the joint complaint, supplement to complaint, and second supplement to complaint of the Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad

Company, intervening plaintiffs, and for answer to the third and fourth supplements to that complaint herein say:

[fol. 6379]

I.

Answering paragraph I of the third supplement to the complaint, defendants incorporate by reference their previously filed answer to the supplement and second supplement to the complaint.

I.

Defendants admit the allegations in paragraphs II and III of the third supplement to complaint, but respectfully refer the Court to the Commission's report of September 19, 1960, for the full and complete text of the finding in that report, relative to the lease agreement, which is partially quoted in paragraph II.

III.

Answering the allegations in paragraph IV of the third supplement to the complaint, defendants admit that the lease agreement differed to the extent found by the Commission in its report of November 26, 1962, from the prior agreement of record, and admit that the letters alleged were sent.

IV.

Defendants admit the allegations in paragraph V of the third supplement to the complaint.

V.

Defendants deny the allegations in paragraph VI of the third supplement to the complaint.

VI.

Defendants admit the allegations in paragraph VII of the third supplement to the complaint and incorporate by refer-

ence our prior answer to the prior allegations referred to by intervening plaintiffs.

VII.

Defendants admit the allegations in paragraphs I through VIII of the fourth supplement to the complaint.

[fol. 6380] VIII.

Defendants deny the allegations in paragraph IX of the fourth supplement to the complaint.

IX.

Further answering the allegations contained in the third and fourth supplements to the complaint, defendants deny that the actions of the Commission challenged therein are unlawful for the reasons specified, or for any other reason whatsoever. Defendants aver that the actions of the Commission are fully supported and justified by the record and are valid and lawful in all respects. Except as herein expressly admitted, defendants deny each and every allegation contained in the third and fourth supplements to the complaint.

Wherefore, defendants pray that the relief sought be denied, and that the complaints of intervening plaintiffs be dismissed with costs.

Robert W. Ginnane, General Counsel, Robert S. Burk, Attorney, Interstate Commerce Commission, Washington 25, D. C., Attorneys for the Interstate Commerce Commission;

Lee Loevinger, Assistant Attorney General, John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C.; Merle M. McCurdy, United States Attorney, Cleveland, Ohio, Attorneys for the United States of America.

[fol. 6381] Certificate of Service (omitted in printing).

[fol. 6440]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, Defendants.

Interveners

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a corporation, and PULLMAN RAILROAD COMPANY, a corporation, Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

BRIEF OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN RAILROAD COMPANY—Filed June 20, 1963 (omitted in printing)

[File endorsement omitted]

[fol. 6604]

The Commission authorized the applicants to handle domestice traffic although the applicants stated to the Commission that "by and through their applications" they did not intend to handle it.

Since the applicants stated they did not intend to handle domestic traffic, the Commission had no authority to receive evidence concerning it or to authorize its handling.

When the Chicago Belt filed its trackage rights application, Finance Docket 19391 (Exhibit H-128), the Rock Island intervened. The Chicago Belt opposed the intervention, filing an Opposition and Brief.

The Chicago Belt denied that Pullman-Rock Island had a right to intervene.

The first paragraph of the brief supporting the opposition set forth the basis of the opposition of the Chicago Belt to Pullman-Rock Island intervention and reads:

> "The Belt Railway Company of Chicago *by and through its application* to the Commission, seeks to secure approval by the Commission of trackage rights to place the Belt in a position to lawfully handle export and import traffic, the movement of which through the Lake Calumet Harbor Port area is anticipated in the future. *The Belt does not seek* through approval of its trackage agreements, *to encroach upon any traffic now originating or terminating at industries served by the Rock Island* or Pullman Railroad Company and *it does not seek to encroach upon any export or import business now being handled lawfully by the Rock Island* or Pullman." (Emphasis supplied) (Tr. 23).

[fol. 6605] In the balance of its Opposition the Chicago Belt took the position that the Rock Island had a right to handle domestic traffic only, that the Rock Island had no right to handle export and import traffic and that it had no

right to intervene since the Chicago Belt intended to handle only export and import traffic.

Regardless of anything the applicants may say, we ask the Court to remember that the Chicago Belt denied that the Rock Island had any rights in the matter—no standing.

After arguing that the Rock Island had no right to handle foreign traffic, the opposition concluded as follows:

> "Accordingly, it is submitted that the Rock Island and Pullman have no legal interest sufficient to justify their intervention in this proceeding and that their present operations are unlawful insofar as they involve the handling of export and import traffic, and for that reason, their petition to intervene in this proceeding should be denied."

The Rock Island filed a reply to this opposition, in which it denied the allegation that it had no right to handle export and import traffic.

The Commission authorized the intervention of the Rock Island. In its order permitting Rock Island intervention the Commission stated, among other things:

> "It further appearing, That applicant on May 8, 1957, filed its reply to the petition (for intervention) alleging that it does not seek to encroach upon any legal operations performed, or to be performed, by petitioners; that it seeks authority to handle export and import traffic which interveners may not lawfully handle; and that petitioners have no legal interest sufficient to justify their intervention;"

A few days after the Chicago Belt filed its opposition and brief, but before the Order of the Commission in that case was released, the Michigan Central, the New York [fol. 6606] Central and the Indiana Harbor Belt, in Finance Docket No. 19448, and the Illinois Central, The Pennsylvania and South Shore in Finance Docket No. 19538, filed petitions with the Commission asking the Commission to

reconsider its orders previously entered permitting the Rock Island to intervene in those cases and requested the Commission, after reconsideration, to vacate its order permitting such intervention.

As ground for the petitions for reconsideration and vacation of the prior orders permitting the intervention of Pullman-Rock Island, these railroads stated that they were making these requests "in the light of the reasons stated in the Belt Railway Company of Chicago opposition and brief."

The Rock Island filed an answer and a brief in support of said answer in response to these petitions and subsequently the petitions of the applicants for reconsideration were denied.

Reciting the above facts, the Rock Island objected at the hearing to the introduction of any evidence as to domestic traffic because it was beyond the scope of the applications (Tr. 23-30) since the applicants had stated that they did not intend to handle traffic which Rock Island could handle —domestic traffic. The objection was overruled, the examiner refusing to allow argument.

In his proposed report the examiner again overruled our position. In doing so he misstated the ground of our objection.

The proposed report read in part:

> "At the opening of the hearing, counsel for the interveners in opposition objected to the introduction of any evidence relating to Lake Calumet Port traffic other than that moving in import and export commerce, *on the ground that the scope of the various applications had been limited by certain pleadings* filed in response [fol. 6607] to the intervening petitions on behalf of the Rock Island and the Nickel Plate." (Sheet 6).

We do not say, and never have said, that the scope of the various applications had been limited by certain pleadings. We say, and have always said, that the original applications asked only for authority to handle foreign traffic.

The applicants said that was their scope—"by and through its application" was the language of the Belt Opposition. That was, in fact, their scope.

The sole and only purpose of the hearing was to pass on the applications.

What the examiner proposed was to grant authority not asked for. He actually held that applications, and statements made concerning them, are really of no effect and that the Commission can disregard the scope of the applications in issuing certificates.

To say the least, this would not be a good precedent for the Commission to establish. Under the proposed report, applications would have no legal effect and the requirements of the Act and the rules of the Commission as to applications would be nullified.

The Examiner closed this section of his report by saying: "Determination of the primary issue of public convenience and necessity for additional rail service cannot be limited by the contents of a pleading in response to a petition for leave to intervene."

Thus the Examiner stated in effect, to all future applicants, "Say anything you wish to say, true or false, to prevent interventions. Nothing you say will be held against you." Clearly this would not be a good precedent. The exercise of such right of irresponsible opposition to interventions nullifies the right of intervention.

The Examiner further said:

> "And there appears no reason for limiting the kind of [fol. 6608] service to be performed by the applicants in the event their applications are granted."

We have shown the reason—the applicants did not ask for the authority to handle domestic traffic.

Near the close of the paragraph the Examiner said:

> "As a general rule, we will not restrict or limit the type of service to be performed by a rail carrier subject to Part I of the act. See *Northeast Oklahoma R. Co. Construction,* 252 I. C. C. 273 (285)."

We are not concerned here with what the Commission does as a general rule when the applications are broad enough to cover the authority granted. We are concerned here with specific problems—the introduction of evidence and the granting of certificates beyond the scope of the applications.

In their reply to our exceptions the comment of the applicants on this point was very brief. They said:

> "The Examiner correctly dismissed such arguments, holding that pleadings did not limit the applications * * *."

Thus, the applicants, in fact, admitted that they had attempted to keep the Rock Island out on the ground that they did not intend to handle domestic traffic. If such was not their intention, they should have said so. They thus interpreted their own language.

At the oral argument counsel for the Rock Island asked counsel for the applicants to answer three questions:

1. If the applicants always intended to handle domestic traffic, why did they, in an attempt to prevent intervention by the Rock Island, make the statements they did not intend by their applications to handle this traffic?

2. If these statements were honestly made, why did they not fix the scope of the hearing?

[fol. 6609] 3. If the applicants had succeeded in excluding the Rock Island on the ground that they did not intend to handle domestic traffic, would they have later reversed their position, and, in the absence of the Rock Island, introduced evidence at a hearing as to domestic traffic?

Counsel for the Rock Island left copies of the questions on the stand so that counsel for the applicants could not ignore or misstate the questions (Tr. 1665-1666, 1670).

Counsel for the applicants pointedly ignored the questions although he did not consume all his time for reply. He could not answer and did not dare at that time to attempt to answer the questions.

In its decision the Commission followed the language of the Examiner on this point except it omitted the sentence reading—

> "Determination of the primary issue of public convenience and necessity for additional rail service cannot be limited by the contents of a pleading in response to a petition for leave to intervene."

The Commission apparently did not wish to publish permission to future applicants to falsify their intentions when they opposed interventions.

In our petition for reconsideration we repeated the questions and challenged the applicants to answer them. In their reply they did answer the questions. They brazenly denied they ever said that they did not intend to handle domestic traffic (Page 7). They pointedly refused to explain their language in the Belt opposition. [We attempted to file a motion to strike these statements, and others, from the applicants' reply as being false, impertinent and scandalous (Page 5), but the Commission refused to allow the motion to be filed because of the technical position that our motion was, in fact, a reply—such documents not being permitted by the Commission (See Section L of Part I of [fol. 6610] this brief). Thus, the Commission protected the applicants. If the Commission had permitted our motion to be filed, the applicants would have been required to discuss their language.]

The applicants find themselves in this delicate position. In their reply to our exceptions the applicants agreed with the Examiner that issues cannot be limited by contents of a pleading, using the words "pleadings did not limit the applications." They refused, in oral argument, to discuss the language of the Belt Opposition or the interpretation put upon this language by the Commission in its order

allowing Rock Island intervention, while later in their reply to our petition for reconsideration they denied there were any statements made that they did not intend to handle domestic traffic (Page 7 of the applicants' reply to Rock Island-Pullman petition for reconsideration of the report and order of October 5, 1959). Sometime in the course of this case we hope to be able to force the applicants to give a straightforward answer as to the meaning of the paragraphs of the oppositions quoted above. If applicants do not explain their statements in their brief, we will attempt to secure an answer in argument.

We want the applicants to answer these questions:

1. What was the ground for the opposition to our intervention?

2. What is the proper construction of the paragraphs of the opposition quoted above?

Of course it is perfectly apparent that if, as stated by the Commission, statements as to the purpose of an application made to keep interveners out are of no effect, there is no reason for the applicants to deny that they made the statement which we say they did make. That they do deny the fact upholds the proposition that the statements made did have a disastrous effect on the applicants' case.

[fol. 6611] The Examiner should have excluded all evidence as to domestic traffic. The Commission should have refused to consider it. At most the applications could have been approved only as applying to foreign traffic.

But since the evidence received as to foreign and domestic traffic cannot be separated so that the evidence as to foreign traffic can be considered alone, the record is really silent as to foreign traffic which will move through the port, and public convenience and necessity as to that traffic have not been proved. [As shown in Section A(3) of this brief, since the evidence as to all traffic is inconclusive and speculative, the applicants failed to make out a case on any theory. The applications should, therefore, have been denied.]

[fol. 6612]

Appendix A-1 to Brief

Copy of a statement of Rock Island-Pullman setting forth testimony it would give at a hearing on the second set of applications, all as set forth in the Rock Island-Pullman Petition for Reconsideration of the Order of September 19, 1960.

See Part II, Section I of this brief.

"(a) In the Rock Island 'Answer and Protest and Intervening Petition' we requested a hearing and, as one ground for the hearing alleged that we were commencing a study to ascertain the actual cost per car for the year 1959 and possibly some months in 1960. In fact, our cost study covered the period of twelve months, April 1, 1959 to March 31, 1960.

"If a hearing had been held, the Rock Island would have introduced evidence proving the following:

"The actual cost incurred on account of handling each loaded car at Lake Calumet, including Calumet Harbor Terminal, during the period April 1, 1959 to March 31, 1960, including all switching and per diem costs, with credit for reclaim allowances and demurrage revenue, was $11.25 per car and, based upon the cost of Rock Island in handling cars to and from interchange points on the rails of the Pullman Railroad, if the cars had been handled to and from the Kensington Yard of the Michigan Central Railroad as the applicants indicated they might do, there would have been an additional cost for the joint facility operation of somewhere in the neighborhood of 63¢ a car. (All this in addition to the costs of rental of Port District tracks, trackage charges, and the cost of getting the cars to the Port which would have been incurred by the applicants.)

"We say that the cost of the applicants at the Port would have been at least $11.25 per loaded car.

[fol. 6613] "The Rock Island does not classify cars by railroads on Port District property. This is done in Rock Island yards adjacent to Port District property. Hence, this cost of classification was not included in our figure of $11.25 which covered costs at the Port District property alone. The proposal of the applicants called for this classification whether done there or elsewhere, and that cost should be added to the $11.25 figure as cost chargeable to the joint facility.

"Mr. Evans' letter (Exhibit H-129) referred to $5.00 per car loaded or empty but in our Appendix 'A' attached to our original Brief to the examiner, we assigned only one $5.00 charge for each revenue car.

"This cost of $11.25 per car or $11.88 per car ($11.25 + 63¢) exceeds the $5.00 cost estimated by the President of the Belt Railway in his letter, Exhibit H-129, as used by the Rock Island to show the improvidence of the proposed operation. The applicants never denied the $5.00 charge was correct, although they implied it was too high and stated that in any event the figure should not be used because it was merely an estimate. The fact is that the $5.00 charge as applied by us was too low by at least either $6.25 or $6.88, as applied to each loaded car.

"Admittedly, wage rates, per diem rates and other items of expense which go into operating costs have increased since the time of the hearing in October, 1957 so that a part of the increase, but a very small one, is attributable to these increases in operating costs. As a matter of fact, the costs actually incurred during the twelve-month period were adjusted to reflect wage rates as they existed on March 31, 1960.

"It is also true that cross-town switching rates and terminal switching allowances have increased since 1957. However, at the hearing we would have introduced in evidence an exhibit based upon the same factors which we used in our Appendix A attached to our original brief to the examiner, in which the increases

in cross-town switching charges and increases in terminal allowances would have been shown. This exhibit would have shown that the increases in revenues due to [fol. 6614] change in freight rates would have been negligible as compared with the increase of costs from $5.00 to $11.25 or $11.88 per car and that the deficits shown in Appendix A would have been greatly increased or in some cases, the balance or revenue available for other purposes shown in Appendix A would have been decreased or turned into deficits.

"In their reply to our exceptions to the Examiner's report, the applicants stated (page 57):

> 'The Examiner was well aware of the fluctuation in rates which would affect the revenue picture illustrated in Appendix A. A good illustration of this is the fact that subsequent to the hearing, and prior to the filing of the proposed report, the allowances on grain had changed from those shown on Appendix A. Instead of showing a revenue of $11.07 per car to the Belt Railway for switching following a road-haul movement by certain railroads, the statement should be corrected to read $11.46, and, where the revenue outbound is shown as $14.08 per car, it should be corrected to read $14.56 per car.'

"Inasmuch as the applicants chose these two cases as illustrative of their point as the effect of rate increases, we will use here for illustrative purposes the same cases from our Appendix A.

"Against a revised revenue of $11.46, as to one set of cars as set forth by the applicants, the total cost would be increased by $6.25 (not including the 63¢ transfer cost) from $13.75 to $20.00 with a resulting deficit of $8.54 or an increase in the deficit of $5.86. Against a revised revenue of $14.56 as to the second set of cars as set forth by the applicants, the total cost would be increased by $6.25 (not including the 63¢ transfer cost)

from $13.75 to $20.00, wiping out the previous 33¢ available for other expenses and substituting a deficit of $5.44. The figures given in these illustrations are not affected by the increases in the cross-town switching charges effective October 24, 1960.

"Of course, the charges for diesel movement are excluded from the statement above as to costs. Under [fol. 6615] the two illustrations diesel trackage charges for the Belt would be $27.00 per day (two round trips) which could be used to arrive at annual costs but cannot be broken down on a per-car basis with the information which we worked up.

"In summary, we would have shown that actual experience at the Port has proved that the original statements made by the Rock Island as to the improvidence of the proposed operation are more than borne out and that the improvidence would have been greater than that heretofore shown by us.

"(b) In our study, we separated, as far as we could, foreign and domestic traffic handled to and from the port by rail. As to grain and grain products moving through the elevators, it was impossible to do this as all grain and grain products handled through the elevators by rail were mingled in the elevators with grain brought in by truck, barge, and ship and lost their identity. There are two exceptions to this statement. Twenty-one cars of imported barley and 3 cars of imported feed moved out by rail. These 24 cars we have included below in our statement as to foreign traffic.

"In this part of the statement dealing with the separation of foreign and domestic traffic, we carry into the figures cars handled at Calumet Harbor Terminal, as well as those handled to and from the Port District industries. Excluding grain and grain products handled through the elevators (except the 24 cars mentioned above), there were 8,193 cars handled to and from the Port District and Calumet Harbor Terminal.

Of these 8,193 cars, 3,609 contained domestic traffic. This traffic was handled to and from the warehouses and other facilities just like any other domestic traffic handled to and from any other warehouses or facilities located on the water or any other place.

"There were 4,584 cars of foreign traffic, not including grain and grain products moving through the elevators (except the 24 cars), of which 56 cars were Pennsylvania road-haul cars, 97 cars were New York [fol. 6616] Central road-haul cars, and 24 cars were South Shore road-haul cars.

"Of the 8,176 cars of grain and grain products moving through the elevators, 15 cars were Pennsylvania inbound road-haul cars, 167 cars were inbound New York Central road-haul cars, and 23 cars were inbound South Shore cars.

"Of the 8,176 cars, 492 were outbound road-haul Pennsylvania cars, 726 were outbound road-haul New York Central cars and 55 cars were outbound road-haul South Shore cars.

"This evidence would prove that eastern territory traffic is extremely limited, as we contended at the former hearing, and that the railroads named above, the Pennsylvania, New York Central, and South Shore have no substantial interest in the business at the Port, particularly, export and import business.

"This evidence would have completely destroyed all pretense that public convenience and necessity required the services of these applicants, particularly the Pennsylvania.

"(c) We would have also introduced evidence showing actions of the Pennsylvania and New York Central Railroads in diverting traffic from the St. Lawrence Waterway bearing out the statement made by Mr. Baylis, Vice President of the New York Central (a witness at the original hearing), in a speech at the Prudential Building auditorium, Chicago, Illinois, in the latter part of 1959 that, 'We do not intend to fill

the St. Lawrence Waterway with concrete, but we do intend to see that it is not filled with traffic.'

"(d) The service of the past 3 years has proved the assertion which we made at the hearing that the Port District yard facilities are not large enough to be used for receiving and breaking up applicants' inbound trains and making up and dispatching their outbound trains. The applicants claim they could be so used, and the Commission erroneously found in their favor.

"It would be necessary, as we would show at a hearing, for the applicants to use the Kensington Yard [fol. 6617] of the Michigan Central (or some other yard) for the purpose of making up and breaking up trains for which they would have to pay rent. Further, the joint facility expense would run at least 63¢ cost per car for transferring the cars from the Kensington Yard to the Port.

"We here point out that so far as we know, no arrangements have been made with the Michigan Central for the use of the Michigan Central yard and no application has been filed for use of said yard. This is similar to the fact that the applicants have filed no applications to serve Calumet Harbor Terminal, located outside of the Port District, but nevertheless, the Commission has granted authority to the applicants to serve the Terminal without applications being filed.

"(e) We would have shown at the hearing that our service has been adequate.

"(f) We would have shown at the hearing that the St. Lawrence Seaway traffic has failed to meet applicants' expectations.

"(g) In their reply to the Rock Island-Pullman Petition For Reconsideration (page 11) the applicants made the statement that 'The estimate of 27,000 cars per year proved to be grossly understated.' We filed a motion with the Commission asking that this state-

ment be stricken because it was made outside of the record and not based on the facts, stating that the estimate of 27,000 cars had been grossly overstated. The Commission refused to allow the motion to be filed on the ground that our Motion to Strike was, in fact, a reply to a reply. The applicants should have ascertained the facts and then advised the Commission of their error, but they did not do so. The actual facts are that in 1958 only 18,604 cars were handled to and from Port District industries, while in 1959, after the St. Lawrence Waterway was opened, only 16,315 such cars were handled, a 12.3% decrease.

"The Commission said in its order of October 5, 1959 (Sheet 32; 307 I. C. C. at 515) that the conservative estimates of traffic 'during the coming year' (1958) 'would be approximately 27,000 carloads, which could [fol. 6618] easily increase to 76,500 carloads a year by 1962.' Certainly, according to this estimate, (and this statement is supported by the record) the estimate would have called for upwards of 50,000 carloads in 1960. Thus, it is apparent that not only were the 1958 estimates grossly overstated, but the estimates for the succeeding years were even more grossly overstated. These estimates were not conservative.

"At the hearing the Rock Island would have introduced evidence showing that the number of cars handled to and from the Port District industries for the years 1958 and 1959 were, respectively 18,604 and 16,315, and for the first nine months of the year, 1958, 1959, and 1960 the number of cars handled to and from the Chicago Regional Port District industries were 14,733, 14,622, and 12,946.

"It is true that the loading and unloading of ships at the Port in the period from about May 18, 1960 to June 6, 1960 was prevented by strike but handling of freight to and from the elevators and warehouses by rail was not stopped. The experience of the whole 2¾ year period shows that the estimates of 27,000 cars

and the other estimates were grossly overstated. This would have been proved at a hearing.

"(h) During the period from April 1, 1959 to March 31, 1960 the road-haul revenue of the Rock Island to and from the properties of the Chicago Regional Port District and from the properties of the Chicago Regional Port District and Calumet Harbor Terminal totaled $818,062, a major part of which would have been susceptible to loss by the Rock Island if the applicants had been operating in the Port.

"The new hearing would have shown the fallacies in the applicants' testimony at the first hearing."

[fol. 6619]

CLERK'S NOTE

APPENDIX B TO BRIEF

"Map of Rock Island Lines—Sketch showing various Railroads in the Lake Calumet Area, Nov. 23, 1959, Chicago, Ill." is omitted from the record here. It is printed at page 1205 supra.

[fol. 7023]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Interveners

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, A Corporation, and PULLMAN RAILROAD COMPANY, a Corporation, Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Transcript of Hearing—January 24, 1964

Transcript of proceedings had before the Hon. George P. Edwards, Judge of the Sixth Circuit Court of Appeals, and the Hons. James C. Connell and Girard E. Kalbfleisch, Judges of Said Court, Commencing Friday, January 24, 1964.

[File endorsement omitted]

[fol. 7024] APPEARANCES:

On behalf of the Plaintiff; The New York, Chicago and St. Louis Railroad Company: Thomas O. Broker, Esq., Kemper A. Dobbins, Esq., John F. Dolan, Esq.

On behalf of the Defendants, the United States of America and the Interstate Commerce Commission: Robert S. Burk, Esq., Dominic J. Cimino, Esq.

On behalf of the Plaintiffs, Chicago, Rock Island & Pacific Railroad Company, and the Pullman Railroad Company: Bruce Dwinell, Esq., Theodore E. Desch, Esq., Edwin Knachel, Esq., John L. Bordes, Esq.

On behalf of the Intervener, Illinois Central Railroad Company: William J. O'Brien, Jr., Esq.

On behalf of the Intervener, The Pennsylvania Railroad Company: Robert H. Bierma, Esq.

On behalf of the Interveners, Calumet Harbor Terminals, Inc., North Pier Terminal Company, and Seaway Stevedoring Company, Inc.: Charles B. Myers, Esq.

[fol. 7025] January 24, 1964, 10:00 o'clock A.M.

The Clerk: The case before the Court this morning is the New York, Chicago and St. Louis Railroad Company, et al., vs. The United States of America, et al. The Honorables George P. Edwards, James C. Connell, and Girard E. Kalbfleisch presiding.

Mr. Knachel: May it please the United States Court of Appeals Judge Edwards, Chief District Judge Connell, and District Judge Kalbfleisch, my name is Edwin Knachel. I am a member of the Ohio Bar Association and the Cleveland Bar Association, and the Cleveland Bar welcomes you to Cleveland, Judge Edwards.

Judge Edwards: Thank you, sir.

Mr. Knachel: I am local counsel for the Chicago, Rock Island and Pacific Railroad Company, and the Pullman Railroad Company, Plaintiffs in this action.

At this time I would like, I have the privilege of introducing to this Court Mr. Bruce Dwinell, former vice president and general counsel of the Rock Island Railroad, Mr.

John L. Bordes of the law firm of Kirkland, Ellis, Hodson, [fol. 7026] Chaffetz & Masters of Chicago, and Mr. Theodore E. Desch, general attorney of the Rock Island Railroad.

These three gentlemen are all admitted to the Illinois Bar, and have been for some years, and are all admitted to the Federal courts in the Northern District of Illinois.

I move their courtesy admission for the purpose of this case and say that all of these gentlemen possess all of the qualities for admission to this Court.

Judge Connell: It is a pleasure, gentlemen.

Judge Edwards: The admission will be noted on the record.

Mr. Knachel: Your Honor, I have one matter of ground rules: I understand there has been established two hours a side, and the Rock Island and Nickel Plate have made a request, I ask this Court to use thirty minutes of that two hours for reply.

Judge Edwards: Is there no objection?

Judge Connell: Sure.

Mr. Knachel: Thank you.

[fol. 7027] Judge Edwards: Will the Rock Island and Nickel Plate be dividing their time?

Mr. Broker: Yes, sir.

Mr. Knachel: Yes, sir.

Judge Edwards: You have worked out an amenable division, and I assume that is true in relation to the party on the other side?

(No response.)

Mr. Cimino: May it please the Court, my name is Dominic J. Cimino. I represent the United States Attorney for this District. It is my pleasure to present and introduce to the Court Mr. Robert S. Burk, who is a member of the staff of the General Counsel's Office for the Interstate Commerce Commission, and who will be representing the United States of America and the Interstate Commerce Commission, defendants in these proceedings.

Mr. Dolan: May it please the Court, I am John Dolan of Cleveland, member of the Bar, of this Court, and the Supreme Court of Ohio. I should like to introduce to the [fol. 7028] Court William J. O'Brien, Jr., a member of the Illinois Bar, admitted to the Supreme Court of the United States and the District Court of Illinois for the Northern District of Illinois.

Mr. Charles Myers is similarly admitted to practice. Mr. O'Brien and Mr. Bierma, who is seated, will represent the Illinois Central, the Pennsylvania Railroad, the New York Central, the Indiana Harbor Belt, the Belt Railway Company of Chicago, and the South Shore and South Bend Railroad.

Mr. Myers will represent the shippers and warehousemen of the Calumet Harbor. I move their admission to practice.

Judge Edwards: Their admission will likewise be noted on the record of the proceeding.

Mr. Dolan: Trank you, your Honor.

ARGUMENT BY MR. BROKER ON BEHALF OF NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY

Mr. Broker: May it please the Court, my name is Thomas Broker. I have been admitted to practice before the Court, and I appear in this proceeding on behalf of the New York, Chicago and St. Louis Railroad Company, [fol. 7029] commonly known as the Nickel Plate or Nickel Plate Road.

This proceeding was instituted by the Nickel Plate to set aside and enjoin reports and orders of the Interstate Commerce Commission authorizing six railroads to invade the Lake Calumet area in Chicago, Illinois. The Rock Island, and its subsidiary, the Pullman, have intervened here in support of the Nickel Plate, and since this is a proceeding for review of a decision by a Federal administrative agency, the United States and the Interstate Commerce Commission have been enjoined as defendants.

The six applicant railroads and three terminal warehousemen have intervened here in support of the defend-

ants. It is my purpose to outline the proceeding before the Interstate Commerce Commission, since such an outline will, in and of itself, prove our contention that the Commission acted contrary to law.

I wish then to discuss some of the legal aspects of this case and then leave some time for rebuttal.

Mr. Dwinell, who has been introduced, will outline more [fol. 7030] of the history and facts and discuss the failure of the Commission to make proper findings and consider all the evidence.

But at the inception of my presentation I wish to summarize this case. It will take one or two sentences. It is this: in 1962 the Commission approved a plan agreed upon in 1961 for the extension of the applicant's lines and operations into the Chicago regional port district, basing its approval solely on the basis of the evidence received in 1957 on a substantially different plan, and even this original plan, the Commission found, had not been properly submitted to it in 1957 for decision. This is incredible.

To repeat, in 1962 the Commission approved a plan agreed upon in 1961, solely on the basis of the evidence received in 1957 on a different plan.

Judge Edwards: Maybe it will be helpful if, at the outset, you would just briefly summarize what you contend the substantial differences between the plan as approved and the plan as originally proposed actually were.

[fol. 7031] Mr. Broker: Yes, sir, may I lead into that just a little bit, please?

Judge Edwards: Yes.

Mr. Broker: Just to outline the matter on the map: basically we went into the proceeding with applications to accomplish two things. First, trackage rights over existing tracks, to an area close to the port; then an application to construct a lead track, shown here in the broken line; and fourth, authority to operate over it.

We went into the hearing with those applications. It was not until the hearing in 1957 that the applicants disclosed

the matter in which they would inquire and operate on the tracks within the port district.

At that time they came in with a proposed lease which had never before been discussed, and they stated they intended to lease these tracks within the port district, and they proposed a joint facility operation. By that I mean they would have a common engine or engines to perform all the switching within the port district, and in order to [fol. 7032] occupy the tracks within the port district they would lease those tracks from the Chicago Regional Port District.

The Commission could not approve the entire transaction because the lease had never been the subject of an application. Consequently the Commission approved only the trackage rights up to the port. It approved the construction up to the port and denied the application to operate and occupy the tracks within the district because they were not the subject of an application.

The applicants came along later in 1960 and requested approval of the lease in a modified form. The Commission approved that lease without a hearing. The port district refused, after all these years, to execute the lease.

In the interim they were negotiating a different contract called a "Non-Exclusive Use Agreement." In fact, they had agreed upon an arrangement without telling the Commission.

Then the port, having refused to execute the lease, they [fol. 7033] presented the Non-Exclusive Use Agreement to the Commission, and it differed from the lease in several respects: first, it was not a lease. It did not give the same quantum of interest in the property. Secondly, the leased property did not include the land, only the track. Third, the consideration was changed. Fourth, the term was changed, and those are the basic differences between the Non-Exclusive Use Agreement and the lease: the term, the consideration, the quantum of interest, and the amount of the property.

Actually, another item was added, and that was this: that the Chicago Regional Port District first had to approve of the method of operating on its track, and delegated under the contract to the port district was the right to change the operations at will.

The Commission approved this Non-Exclusive Use Agreement, and it is my contention that is an unlawful delegation of authority. If these applicants had come to the Commission for approval in the matter of the operation the Commission could not delegate to those parties, and to [fol. 7034] the port district, the right to change the operation at will.

Does that answer your question, sir?

Judge Edwards: Yes, to a considerable degree. Might I pursue that one step further. I recognize this is a pretty formidable record, and it is a matter where you may be able to be helpful by getting into some of the details of this. Am I correct in assuming that the lease which you refer to in relation to the port district does not involve your client at all?

Mr. Broker: No. It does not. We were not a party. We were invited to join, and we refused.

Judge Edwards: Then that does not pertain to any trackage or rights which you have, or for that matter, which Rock Island has?

Mr. Broker: Well, the Rock Island is in the area right now and has been serving the southwest corner of the lake for many years.

Judge Edwards: I appreciate that. The question is, are they involved in that lease with the Port District?

[fol. 7035] Mr. Broker: They are only involved in that this lease provides they may continue to operate as they have. We are not involved, as a matter of fact, your Honor.

Judge Edwards: That lease would not presuppose the use necessarily of your trackage or Rock Island's trackage?

Mr. Broker: It would not.

Judge Edwards: Thank you.

Mr. Broker: As a matter of fact the Nickel Plate is on the east side of the lake. As a matter of fact our property interest actually includes part of the lake, since our main yard is up here (indicating), and the Nickel Plate could not operate here (indicating) without going to the Commission for appropriate authorization; but I should say the original applications were not limited evidently, or the original plan to serve in the general area.

What they were doing was attempting to invade the entire area, and basically the Nickel Plate's interest is this: once the camel gets his nose in the tent he is all over [fol. 7036] the lake.

In this case the pertinent provisions of law are Section 1, Subsection 18, and Section 5, Subsection 2. We commonly refer to these as 1-18 and 5-2, just as we refer to Section 1, Subsection 19 as 1-19, more or less a shorthand way of reference.

Section 5-2 is very much in the news these days. That is the section under which various railroads seek authority to merge and consolidate, but it is also the provisions under which an applicant must go for approval of the acquisition of trackage rights.

Section 1-18 requires a railroad to get a certificate of public convenience and necessity for the construction of a new line of the railroad or for extension into new territory; and then the Section 5-2, the trackage section, the applicants must prove the transaction will be consistent with the public interest.

Under 1-18 they have a stronger burden of proof, that the construction or extension is or will be, required by present or future public convenience and necessity.

[fol. 7037] Under Section 1-19 the Commission must prescribe and follow rules of general procedure before issuing a certificate of public convenience and necessity, and accordingly the Commission has backed up Section 1-18 and also 5-2 with various rules as to the procedure to be followed on the content of applications, and this includes all contracts, all tentative or prospective contracts, the method

of financing, estimates of traffic, gross and net revenues; and by promulgating these general rules, the Commission has declared the information required is the body of substantial evidence deemed relevant to a decision under Section 1-18 or under 5-2.

Now, I will describe briefly the geographical situation: Lake Calumet is an inland lake, shallow in depth, connected to Lake Michigan, six miles distant, by the Calumet River. At the southwest corner of the lake the Chicago Regional Port District has contructed various warehouses and grain elevators and has more than ten miles of track, and including a yard at the location.

The Rock Island has served this for many, many years. [fol. 7038] At the confluence of the lake and river, at this location (indicating), there is a piece of property not owned by the Chicago Regional Port District. This is now owned by the Pennsylvania Railroad, purchased just before this proceeding started, and occupies at the moment Calumet Harbor Terminal Incorporated, and the Calumet Harbor Terminal operates the property as a warehouse.

The lake is surrounded on the west and south by the Rock Island, on the east by the Nickel Plate.

Judge Edwards: Mr. Broker, could you show us approximately what ownerships, if any of them are relevant to the litigation, are in the balance of the circumference of the lake?

Mr. Broker: Well, actually, when the lake is completed it will be filled in, so the attention is more or less in line with the diagram you see there on the map.

In other words, the Nickel Plate is presently on the northeast corner of the lake. That property will be filled in. The entire bed of the lake therefore, for practical purposes, as [fol. 7039] now exists and hoped to be developed, will be owned by the Chicago Regional Port District, a municipal corporation within the City of Chicago.

Judge Edwards: But that would still exclude the portion owned by the Pennsylvania Railroad?

Mr. Broker: The Pennsylvania Railroad owns this point (indicating), so that for practical purposes the only property not owned by the Chicago Regional Port District on the lake is, at this point, owned by the Pennsylvania and occupied by the Calumet Harbor Terminal, but the fact that the Pennsylvania purchased it does not give it rights as a carrier to serve it unless the Commission—

Judge Edwards: But the basic Commission plan does not contemplate acquiring that property?

Mr. Broker: No, sir.

Prior to this, and the only hearing was held in 1957, we saw the applicants divided into three camps, each one seeking to build its own line up to the port, and each seeking to handle all of the traffic. By the time of the hearing [fol. 7040] they had joined forces for a common assault on the Nickel Plate and Rock Island, and as disclosed in their applications, then on file, they proposed to operate over each other's lines as required to reach point B, and this was an application under Section 5-2 for trackage rights.

In addition, the Pennsylvania Railroad and the Illinois Central, a subsidiary, sought authority to construct this track, and the other sought authority under Section 5-2 to operate over it. In other words, we went into a hearing without any disclosure of the manner in which they would occupy and use this property and these tracks within the Port District.

As the hearing proceeded they disclosed their plan. Each applicant would operate two trains in and two trains out daily over this track into the Port yard, and then the common switching engine would perform the breakup of the train and the make up of outgoing trains and perform all the switching to and from industries.

This is a yard of 300 car capacity which the applicants [fol. 7041] have requested the Commission to find inadequate and we agree, it is inadequate.

Now, I objected strenuously to the offer in evidence of the lease of the Port District transaction and so-called Joint Facility Agreement. Nevertheless the examiner re-

ceived them in evidence, and later the Commission approved that receipt in evidence, even though they had not complied with the standing rules requiring a prior disclosure of applicants' contracts.

Now, in this connection, Section 5 of the Administrative Procedure Act states that persons entitled to notice of a hearing, as we were, shall be timely informed of the legal authority and jurisdiction under which the hearing is to be filed and matters of fact and law asserted. In effect, this only incorporated in statutory form the due process requirement of proper notice of hearing.

The examiner recommended approval of the entire transaction, including approval of the lease and joint facility agreement, but the Commission did not agree with him en- [fol. 7042] tirely. It disapproved the operation within the Port District, including the lease, on the ground that appropriate applications had not been filed, and it said, "Orderly procedure dictates that all applications required to affect the entire plan be heard simultaneously."

Nevertheless, in spite of that statement it did approve of the trackage rights up to Point B and construction of a connecting track between B and F, shown on the map; and even though it held that additional applications were required of the lease and the operation within the Port District, it imposed a condition on the lease to permit the Rock Island and Nickel Plate to enter the property, and then it found, despite the absence of applications, that the lease and joint facility agreement would be economical, practical, and advantageous; and this we contend was a prejudgment of a possible future application, aggravated by the fact we had not even had notice prior to the hearing of the matter prejudged.

Well, the second stage of the case mentioned in 1960 was when the applicants filed supplemental applications for ap- [fol. 7043] proval of the lease in modified form. The lease in modified form contained the condition imposed by the Commission, and also changed the consideration. We re-

quested a hearing. The Commission refused to hold it. I wish to say this was a year after the opening of the St. Lawrence Seaway which was to provide the traffic which justified, so the applicants contend, their entry into the Port; and yet the supplemental application contained no evidence of the public convenience and necessity and simply incorporated, by reference, the previous evidence that had been received three years before, in 1957.

Well, in a supplemental report, in 1960, the Commission approved the modified lease. It stated that the applicants had merely cured a technical deficiency, that it saw no reason to revisit upon the applicants and others the additional time and expense of another hearing.

As the applicants and Government said, it saw no reason to rehash the entire case; but actually this was not true, either in law or fact, because the obligation of the [fol. 7044] Commission was to find present public convenience and necessity, as a matter of law.

As a matter of fact, the Rock Island offered to show that less traffic was being handled at the Port District after the St. Lawrence Seaway than before, and this has been true every year since.

In substance, the Commission denied the hearing and decided the case on the basis of the private convenience of the applicants rather than on the basis of public convenience and necessity, and it confirmed its pre-judgment of the case when it said its 1959 report was a determination to accord the applicants the same right to operate on the property as the Rock Island had.

So at that point, in 1960, the second stage of the proceeding concluded, and the applicants had their full authority from the Commission to proceed, but they had one major impediment; that is, the Port District refused, after all these years, to sign the lease.

We had warned the Commission of this fact, and in anticipation the Commission provided that if this lease, [fol. 7045] if approved, should be changed it would be necessary for the applicants to come back and get a prior approval.

Actually the Port District and the applicants had been negotiating on a different agreement. They had an agreement upon one, but they never told the Commission. That arrangement was wrong, and negotiations continued, and finally in 1961 they came back to the Interstate Commerce Commission with a document entitled "Non-Exclusive Use Agreement" and they filed it with the Court—with the Commission, and advised the Commission that it conformed to the changes that had been specified in the previous reports.

We objected and the Director of the Bureau of Finance wrote to the applicants and advised them that because of substantive changes from the lease which had been approved, they needed Commission approval.

When the applicants learned their mere filing would not be sufficient to obtain the Commission approval they filed a petition in November of 1961, four years after the hearing for approval of the use agreement.

[fol. 7046] The petition was not verified. It had no evidentiary value. It didn't even refer to public convenience and necessity. As a matter of fact, it said, and I quote, "The matters involved do not involve any public interest."

I have previously described the various ch ges of substance from the lease which had been approved by the Commission. We pointed out to the Commission that the Port District had never approved of the manner of operation, and therefore that the use agreement was not effective. The Commission then issued an order, in August of 1962, advising the applicants that if they did not produce evidence of a Port District concurrence in the operating plan they would consider vacating the applicants' and authority previously given, and this proof—again the Commission regarded the entire plan as a entity, trackage rights, construction, and the operation within the Port District, and finally, September of 1962, the applicants advised the Commission that the Port District was satisfied with the operating plan.

[fol. 7047] We again requested a hearing, and this was denied, but the report approved of the use agreement, with

its unprecedented, and I believe unlawful, delegation to the Port District of the authority to change the manner of operation within the Port District at will.

So we ended the third and last stage of the proceeding between the Commission, in 1962, with a finding that the then present and future public convenience and necessity required the extension of their lines into the Port District, with open admission that the lease and evidence of public convenience and necessity had been received in 1957.

So repeating again my original summary of the case: in 1962 the Commission approved a plan for extension of lines, submitted to it in 1961, solely on the basis of evidence received in 1957, on a different plan, which was not before the Commission properly in the first place. So in the light of this, consideration must be given to the requirement for lawful decision by the Commission and proper scope of the judicial review.

[fol. 7048] I want to make observation of the briefs of the defendants and applicants. The most noteworthy feature of those briefs is the effort to cover up and divert attention of the absence of evidence after 1957, absence of evidence of public convenience and necessity, and a complete absence of evidence justifying the use agreement.

Nowhere is this effort to gloss over the lack of evidence more apparent than in the defendants' efforts to restrict the scope of the judicial review by this Court. They cite more than 200 cases, as if we were seeking to change the law.

Now, actually we endorsed the statement on Page 10 of the Government's brief that the principal issue before this Court is whether the Commission's action is based upon adequate findings, which in turn are supported by substantial evidence of record, which, when considered as a whole, or stated otherwise, whether there is a rational basis for the Commission's action; but we do differ with the Goverment and the applicants on how the issue was to be resolved.

[fol. 7049] We state that the scope of the judicial review is co-extensive with the issue before the Court; that is, that the Court is entitled to examine the whole record to determine if there is substantial evidence. The Court is entitled to consider the findings to see whether they support no substantial evidence, and we do differ also in that we say the whole record includes the body of evidence opposed to the Commission's decision, as well as the refusal of the Commission to follow its own rules of procedure.

Now, on the other hand, the applicants would limit the scope of the judicial review and cover up this lack of the evidence after 1957 by stressing that this is a matter entrusted to the Commission's expert knowledge which is not to be invaded. They would argue that Congress has delegated to the Commission the right to decide what is public convenience and necessity, what is consistent with the public interest, and they constantly emphasize the discretionary powers of the Commission; and then, entirely inconsistent with the claim of an expertise they try to limit [fol. 7050] the function of this Court by saying the Commission is entitled to use, "unwisdom," it is entitled to misjudge the evidence; that the Court is not concerned with the correctness of the Commission's reasoning is, that it is sufficient, in the Commission's consideration,—that evidence which it has allowed to be submitted in the case.

Now, such arguments as these, that a party must accept any action of the Interstate Commerce Commission on the grounds of alleged expertise would make any court of appeal futile and would completely nullify the Administrative Procedure Act.

We say quite the contrary, the purpose of court review is to test whether or not administrative expertise has, in fact, been employed; not to substitute judgment, but to determine whether or not it has been employed, and of course the purpose of court review is to test whether or not the Commission has kept within its delegated powers, and whether it comes under the Constitution of the United States.

In fact, the very statement of the issue in this case, the [fol. 7051] determination of whether there is a rational basis for the Commission's decision, shows that the exercise of expertise is to be tested.

Well, let's see whether or not the defendants are justified in claiming, as they have on brief, and may on argument, justified in claiming that the Commission exercised its expertise in this case.

Basically public convenience and necessity hinges on two items in this case: first, that additional rail service is needed at the port because of anticipated increases in traffic, and secondly, that the applicants' proposed extension into the Port District will financially, economically, and profitably fulfill that need.

On the first item, whether there is a need for additional service, no one disputes the fact that the last evidence received was at the 1957 hearing, and that evidence consisted of estimates by a non-shipper of future volume of traffic, and also some actual figures submitted by the Rock Island for a portion of 1957.

[fol. 7052] Since that time the St. Lawrence Seaway has opened, and we have been attempting in vain to get to the Interstate Commerce Commission the volume of traffic that has been handled at the Port to determine whether the estimates have been fulfilled.

We simply cannot get the Commission, the regulator of the transportation, including a great deal of the transportation on the Great Lakes, to receive evidence that there is less rail traffic at this port today than there was before the Seaway opened; and this entire case hinged on the estimate which the Port District General Manager made of the growth of the traffic.

Judge Edwards: How then do these figures get into your briefs?

Mr. Broker: Because we have proffered them. The Commission would not let us put them actually into evidence. I believe we were entitled to submit this into evidence. I believe we were entitled to ask the applicants on what basis

they now would justify their entry into the Port. They continually reply upon the original statement, for example, the [fol. 7053] estimate by the General Manager, the Manager of the Port District, was that in 1962 there would be 76,500 cars.

We have been trying to show the Interstate Commerce Commission that in 1962 only 17 per cent of the estimate has been fulfilled, and we cannot get it into the record, except by means of a proffer which has not been accepted.

As far as the Non-Exclusive Use Agreement is concerned, as I stated earlier, the petition for its approval was not verified. There is absolutely no evidence in the case on that document.

In short, with such a record, we claim there is no exercise or display, or expertise, by the Commission to which the Court can point. In other words, we think there is no rational basis for the Commission's decision.

Now, we will turn, please, to the due process. This has numerous facets, all based on the proposition of the reasonable notice and fair hearing and opportunity for cross-examination.

Now, when the Commission decided in 1959, without having appropriate applications, that the applicant should be [fol. 7054] permitted to enter the Port District as it said it did, it pre-judged this case; and later, in its 1960 and 1962 reports, when it relied on that 1959 determination and 1957 evidence, it confirmed its pre-judgment.

Now, if the failure to file these original applications was a mere technical defficiency why was it necessary for the applicants to publish their notice in the newspaper? If the notice was good enough for us, as the Commission found, why wasn't it good enough for the rest of the public? If it wasn't good enough for the rest of the public, it wasn't good enough for us, and further, on this issue of notice and due process, since the applicant and Port District and Commission did not know the arrangements for occupancy under the Non-Exclusive Agreement until 1961, how can it be said that the Nickel Plate and Rock Island, in 1957, had

had sufficient notice to anticipate it? How can we be held to have notice in 1957 of a 1961 arrangement that was not even within the contemplation of the parties?

[fol. 7055] Now, the defendants' briefs say we had a fair and full hearing, and I am going to ask them specifically when and where was any hearing held on the plan which they actually would put into effect? When did we have an opportunity to cross-examine on the Non-Exclusive Use Agreement? Why can't we find out from the applicants and the Port District what the circumstances were that required them to enter into the Use Agreement as opposed to the original lease?

And now, coming to the question of a necessity for a hearing, the defendants again stressed the discretionary power of the Commission, and they missed the point in several ways.

We have here a blending of the application under Section 5-2 and 1-18; but even if they are correct, and I don't agree, even if they are, that the Commission has a discretion whether or not to hold a hearing, I say, where is the evidence to support the Non-Exclusive Use Agreement? There is none, certainly not at the 1957 hearing when the Non-Exclusive Use Agreement was not even in contempla-

[fol. 7056] tion; certainly not in the 1960 application to approve the modified lease, and certainly not in the petition to approve the Non-Exclusive Use Agreement, and there is no other place to look; so this issue of whether or not there should be a hearing, and whether or not the Commission has discretion basically comes down to the proposition, did the Commission have evidence to approve the Non-Exclusive Use Agreement, and we contend it did not.

There were two facts of record that stood out, however: first, the refusal of the Port District to execute the lease, and secondly, its failure for five years after the hearing to approve the operating arrangement. This in itself shows the lack of public convenience and necessity.

Now, as their last resort the Government even contends it is sufficient for the Commission to receive the plaintiff's

argument on the changes of the lease. In other words, they finally admit there was no evidence of public convenience and necessity, and they state that none is needed.

[fol. 7057] Our contention, on the other hand, is there must be evidence, and we say further, it must be reasonably close to the time of the Commission's decision, certainly not earlier than the petition for authority. They cite the Atchison case as being the only case in which the Commission has been overruled because of a stale record.

I say that we have a stronger case than the Santa Fe case. That was a rate case, and the depression intervened; and the case before this Court, the applicants reopened the case twice after the 1959 decision, and the Commission was obligated to make a finding of the present and future public convenience and necessity; and I say they could not make such a finding of present or future public convenience and necessity without evidence and without evidence reasonably close to the time of the decision.

I believe that when the Rock Island offered to show that there was less rail traffic at the Port District each year after the opening of the St. Lawrence Seaway than before, the Commission had a duty to demand that evidence, not [fol. 7058] merely for approval of the use agreement, but to determine whether it would keep its previously granted authority in force.

In conclusion I want to say all of the errors of the Commission which I have discussed are epitomized in the Commission's failure to observe its own findings as to the dictates of orderly procedure, and that is just another term for due process, its failure to hold simultaneous hearings on all required applications for affectuation of the plan. Thank you.

Judge Edwards: Thank you, sir.

ARGUMENT BY MR. DWINELL ON BEHALF OF CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY AND PULLMAN COMPANY

Mr. Dwinell: May it please the Court, at this point in the case the most outstanding feature—

Judge Edwards: I am going to have to ask you your name.

Mr. Dwinell: Bruce Dwinell, your Honor.

At this point in the case, the most outstanding feature is the shocking fact that the counsel for the applicants and Commission do not deny a single fact which is set forth in [fol. 7059] our first brief to this Court or defend on the merits a single act of the Commission which we said was wrong.

They do not defend on the merits a single finding of the Commission which we attack, yet they ask this Court to uphold that which they refuse to defend.

Overall their total defense in this case is that the Interstate Commerce Commission is supreme, this Court has no power.

Now, I will discuss the history of the Port, physical facts, the location of the facilities, the location of the railroads, the proposals of the applicants, the lack of facts as to future traffic and transportation needs, and in particular some of our contentions based on the record and some of the errors which the Commission committed in disposing of these matters. I refer to my sketch (indicating).

Lake Calumet is a shallow lake of 2,250 acres, two miles long and one and one half miles wide. The distances are shown.

It is located in the southeast corner of the City of Chicago. The lake must be dredged and facilities built along [fol. 7060] its edges on the filled land in order to make it usable. The lake is connected to Lake Michigan by the Calumet River, running up this way (indicating) for a distance of six miles or so.

The lake is owned by the Chicago Regional Port District, a municipal corporation, which has, however, no taxing power. It can issue and has issued, revenue bonds and has built docks, three transit sheds, a warehouse, and two elevators. What was there built by the District at the time of the hearing? Two elevators, three transit sheds, and some railroad tracks.

The revenue bonds, totaling $24,000,000 were sold upon the credit of the private corporations which leased the premises which I have just mentioned.

The District built railroad tracks abutting these facilities and a 10-track yard, holding 300 cars, the total length of all tracks being 10.6 miles.

The docks, the transit sheds, the railroad tracks, and the warehouse were put in operation in September of 1956, and [fol. 7061] the elevators in the spring of 1957.

Against the wall the applicants have brought here a picture of the dream of what might happen. That picture is the basis upon which the Commission was supposed to grant the applications. The Court will note all of the slips and docks and elevators and what have you.

I call your attention to what was there. And what was there? Three transit sheds, two elevators, the railroad tracks, and sixteen tanks over here (indicating). The rest of it? Nothing.

Nothing has been done in the last seven years in the erection of facilities except the construction of the sixteen tanks, not the forty tanks shown upon the picture, only sixteen. There has also been some filling of the land. I call the Court's attention that all of that was to be done by 1970.

The development on the southwest and south corner of the lake here (indicating) is serviced by the Rock Island Railroad Company, our railroad tracks, in and about the lake, and up north they are shown in red.

[fol. 7062] That part shown in red was originally owned by the Pullman Railroad Company. At the North (indicating) the old Pullman Railroad connects with the Rock Is-

land Railroad which was there for many, many years. I point out the yards of the Rock Island in this vicinity here and here (indicating) with the capacity of seventeen hundred cars at the time of the hearing and a potential capacity of 3,206 cars. These yards are used to serve the Port and other industries and to exchange cars with other railroads.

East of the lake, shown in green, are the tracks of the Nickel Plate Railroad. The tank farm, which I had just mentioned, is on the Nickel Plate side of the lake. It was built in 1962.

The Rock Island not only handles its own cars into and out of the Port, it handles also the cars of other railroads as a switching carrier, for which handling it receives switching charges. In other words, if the Burlington, or any other railroad, brings a car into Chicago, destined to the lake, we take it and put it into the lake at the proper place.

[fol. 7063] Now, a little history: the Pullman interests go back to 1880. Originally the Pullman interests owned 4,000 acres of land in the vicinity of the lake, including the riparian rights. In the course of time, the Pullman interests dedicated streets and gave up their riparian rights and deeded the land to the United States for widening the Calumet River.

It served the territory alone until after 1917, when the Michigan Central took up some tracks which it had formerly used to serve some ice houses.

In 1946 the Illinois Central asked authority of the Illinois Commerce Commission to build what it called a spur track to the lake at this point (indicating) across the Rock Island, Pullman tracks and a highway. The case went to the Supreme Court of Illinois which held the track was not a spur but an extension of the line of the railroad, of the Illinois Central, requiring a certificate of the Interstate Commerce Commission.

We deal with this Supreme Court case on Pages 10 to 12 [fol. 7064] of our briefs. This was the first invasion attempt.

In deciding this case the Supreme Court of Illinois based its decision not only on the statutes, but also determined that the Court should protect a railroad which had served the territory exclusively for many years, taking the bitter with the sweet, and which was entitled to the fruits of its labor. Those last phrases are the words of the Supreme Court of Illinois.

The Rock Island contracted to buy the Pullman Railroad. In 1949, subject to the Interstate Commerce Commission's approval, the purchase was approved by the Commission. It attached certain conditions to its approval which were inserted to assure the neutrality of the railroad in serving the Port. In other words, we would not give better service to our traffic than we would give to the traffic of others. All parties have agreed that these conditions have been observed.

When the Rock Island applied to the Commission for authority to purchase Pullman, Illinois Central intervened, [fol. 7065] asking that it be given a power and right to purchase the south half of that railroad, the one serving the lake end of the Rock Island; while the Belt Railroad, one of the parties before this Court, asked authority to purchase all of it.

At that time these railroads were not concerned with the multiple railroad service. They were saying, "We alone can serve the lake properly. We got the railroad."

Now, as to the proposal of the applicants, the Illinois Central, which owns the line coming down here (indicating) proposed to build a little piece of track running off of the South Shore track, which is owned by the Illinois Central, up under a bridge at 130th Street.

The Pennsylvania Railroad proceeds to build a track across its own property and across the Port District Property, under a lease which we have never seen, and therefore we do not even know that it exists, to a connection with one of the industry tracks.

Then, having done that, they constructed the three pieces [fol. 7066] of track. All of the parties have entered into

trackage contracts. The Pennsylvania and Illinois Central have given each other the right to use the new track. The Illinois Central and Pennsylvania have signed a contract giving the South Shore, the Chicago Belt, the New York Central, and the Indiana Harbor belt, the right to use the new tracks. The Illinois Central and South Shore have granted the Pennsylvania the right to use the South Shore tracks from a point here (indicating) down to a point of connection with the new track.

Now, how will the Pennsylvania get there? The Pennsylvania Railroad owns a line of railroad which runs down like that (indicating). It is on a line of the railroad off the map, and it owns a line of railroad down here (indicating).

Its proposal is that it will run its trains up here, up the Illinois Central, down here (indicating), around and over the new tracks into the Port District; or it can take its cars from here (indicating), run them over the Belt Railroad, where it has operating rights, up onto the Illinois [fol. 7067] Central, down here (indicating), and around into the Port.

It is an extension of about 11 miles for the Pennsylvania Railroad to go to get into this piece of property. The Chicago Belt would come, bring its cars from the Belt yard here (indicating), up, down, and around eight or nine miles, for it.

The New York Central has a track here (indicating). The Michigan Central Railroad—they would get onto the tracks of the South Shore right here (indicating), and then in.

Each of the applicants now said at the hearing that it proposed to operate its own trains over these various routes, two trains a day in each direction, a total of 24 trains for them, in and out.

The inbound trains would be taken into the port yard where a joint switch engine would break up the trains, assemble the cars to switching blocks for the various industries, and then switch them to the industries' track.

In reverse, this engine would take the cars from the in-
[fol. 7068] dustries and take them into the yard and assemble them into trains for outgoing movement.

The main issue in the case was whether public convenience and necessity required the approval of these applications. Mr. Broker has already discussed the fact that all parties are agreed that the conclusion of the Commission must be supported by adequate findings, which are in turn supported by adequate evidence, based on the evidence as a whole.

The body of the evidence must be considered, whether it is opposed to the Commission's view. The Commission cannot look only at the evidence in favor of the conclusion which it ultimately desired to reach.

He also discussed the proposition of our opposition to that which would strip the Court of all power. I mention only a few of the errors made in the findings. I am taking their own proposition that the findings must be adequate and testing it.

This Port yard which is shown here has a capacity for 300 cars. The Port officials say they will not enlarge that
[fol. 7069] yard. Based on experience we said at the hearing that the proposed plan would not work. We said it would not work because the Port yard is not big enough to prevent the breakup and make up of applicant trains in this at the same time the yard was being used for the purpose of assembling cars to and from the industries for switching. In other words, the yard was too small.

We got help from the applicants in our contention that —in their requested findings of fact No. 5 on page 207 of their brief to the examiner. The applicants asked the examiner to find, this was back in 1957, that the yard was already a grossly inadequate yard; and not content with that statement, in their brief to this Court, on Page 11, the applicants said, "The track facilities of the Chicago Regional Port District are wholly inadequate to serve the facilities of the Port or the ships in the harbor."

Now, what did the Commission do: contrary to the facts, and more particularly the admissions of the applicants, the Commission found, at Page 513 of its report, October 5, [fol. 7070] 1959, "There was nothing in the physical conditions to interfere with the proposed operation."

Gentlemen of the Court, the Commission approved an inoperable proposal. We contended that the applicants would be required to furnish yards for the break up and make up of their—

Judge Edwards: Did anything in the finding of the Commission interdict or prohibit the future expansion of the yard that you are talking about?

Mr. Dwinell: Within the Port District?

Judge Edwards: Yes.

Mr. Dwinell: No, sir, but the Port District said it would not do it.

Judge Edwards: Well—

Mr. Dwinell: And the Commission has no power—

Judge Edwards: —to make it do it, yes, I appreciate that; but there was no prohibition against enlargement?

Mr. Dwinell: Oh, no, no.

Judge Edwards: All right.

Mr. Dwinell: We contend the applicants would be re- [fol. 7071] quired to furnish yards for the make up and break up of their trains outside of the Port property that added distance.

Now, the joint switch engine—anyone would have to take the cars to and from the outside yard. The Commission said, Pages 508 and 9 of its report that, "The Kensington yard of the New York Central could be used for this purpose," although the New York Central had stated they would charge for the use of the yard, and although there were no facts as to the costs which would be incurred, and no application had been filed for the use of the yard or the tracks leading to it.

Thus this Commission erred in approving in advance the possible future application for the use of a yard, and based

on that possible future approval of a future application, approved the applications of the applicants in this case.

We showed there would be congestion on the South Shore's tracks, and the Commission said that the South Shore tracks would not be used any more than at present. [fol. 7072] Cars from the Belt are delivered to us here (indicating), at this time. We take them in. Under the proposal the Belt would use the tracks. Pennsylvania cars would be delivered to us here (indicating) in our South Chicago yard. Pennsylvania cars would come around and use it. Illinois Central cars would use it only to the point of connection. New York Central cars would only use it to move across—a move across. Michigan Central will go the distance. Illinois Central will go the distance. The others will go the distance, and the Commission notwithstanding those facts, said it would be used no more than at present.

Reliance on expertise, your Honors, is all right, but expertise should be exercised.

We maintained before the Commission that the operation would be improvident, and we showed in the procedure, Page 41 and Page 42, that the Commission erred in finding, on Page 508 of its opinion, that it would be profitable.

As to these four items of misstatement of fact by the [fol. 7073] Commission the applicants said nothing. Counsel for the Commission disposed of these matters in the last paragraph of these briefs, on Page 25, by merely saying, "It is enough that the Commission considered costs, locations of yards, the running time involved, and the density of traffic over the busy line of the South Shore."

Thus counsel for the Commission says that it is beyond the power of this Court to look into the facts, already previously acknowledged by him, that the findings of the Commission must have support and not be contradictory to the record.

Of course, my assailants have been relying on a proposition made by him else where in his brief that the Commis-

sion is, "Permitted to misjudge the evidence and use unwisdom."

One of the most serious errors committed by the Commission in its first opinion and order was basing its decision upon what it stated was a conservative estimate of future traffic made by the Manager of the Chicago Regional Port District. He said there would be 27,000 cars in 1958, 76,500 cars in 1962, 115,000 in 1968 and 250 to [fol. 7074] 300,000 cars after full development of the lake. This finding is made on Page 515 of the Commission's opinion. The Port District Manager had based his so-called conservative estimates upon development of the facilities at a certain rate, with full development by 1970.

I call your attention to the footnote at the bottom of Page 72 of the applicants' brief, where the Port Manager's testimony is summarized. He anticipated a certain amount of traffic for each square foot of warehouse space, which would be like saying an automobile company will sell a million cars in any year because it can produce a million cars; and again a certain amount of traffic for each unit of elevator space, and that a certain percentage of the total traffic would be rail.

On cross-examination I asked the witness, at Pages 114 and 115 of the record, a question using a certain figure. Well, we got into an argument about my figure, and that was all ironed out, and I will read the question as I asked it, corrected as to the figure.

"Question by Mr. Dwindell:

[fol. 7075] "Q. You gave me some figures this morning, gave us some figures this morning on carloads in and out of the Port, and those figures came, really, so fast that I am confused about them; and I am not going to ask you to go back and reconstruct them, but as I got your statement it was this: after the seaway is completed, after the Port is developed to its capacity, I mean physical capacity for development, which is contigent upon finding lessees

in part or finding money in part for constructing facilities, and if all of the facilities which will be constructed, if, as, and when, are operated to their full and complete capacity, and if percentages used by you in computing the portion of the traffic which would be handled by railroad are fully realized, there would be 250,000 cars in and out?

"A. Yes, that is about right, yes."

If, if, if, if; and the Commission said that was a conservative estimate and is the basis of the whole opinion of the Commission in this case.

Judge Edwards: Do you mean to say 250,000 cars an [fol. 7076] hour?

Mr. Dwinell: No, in and out.

Judge Edwards: In and out. I see. Thank you.

Mr. Dwinell: Thus the findings of the Commission as for future traffic were speculative, were premised on the possible future development of the Port, were dependent upon the operation of the possible future facilities, at full capacity the year around, at the best. The Commission's orders were based on mere speculation as to possible future potential.

Our contention that these statements as to future traffic were purely speculative were proven to be true by the actual results of operation. The actual figures for the traffic of the Port District are as follows: 1959, 18,000 cars, as contrasted with a so-called estimate of 27,000; 1959, 16,000; 1960, 14,000; 1961, 13,000; 1962, 13,000, as contrasted with a so-called estimate of 76,500.

In 1962 traffic was—

Judge Edwards: I take it, in effect, this is direct testi- [fol. 7077] mony that you are offering the Court now; that is, this is not in the record?

Mr. Dwinell: This is not in the record as made at the hearing. These figures were proffered from time to time, and the last figures that I gave were included in our petition for a hearing and constituted a proffer of evidence. They were properly before the Commission, and therefore I think properly before this Court.

I would like also to say to the Court that the first attempt to give evidence as to traffic, outside of the record, made at the hearing, was made by the applicants. In their reply to our petition for reconsideration of the Commission's first order they said that the applicants, that the figures given by the Port Manager, were conservative as proven by the fact that the figures for 1958 of 27,000 cars proved to be below the traffic.

Judge Edwards: Now, counsel, would you tell me whether you think that that was then properly before the [fol. 7078] Commission as a part of its record?

Mr. Dwinell: The 27,000 figure?

Judge Edwards: The figure offered by the applicants.

Mr. Dwinell: No, sir, I moved to strike that.

Judge Edwards: Then, you are now saying that what you feel they did not have the right to do before the Commission, you have the right to do, because these figures were included in your pleading?

Mr. Dwinell: Yes, sir, yes. We moved to strike that on the grounds it was outside the record and untrue under a rule of the Commission which prohibits impertinent and scandalous matter. Perhaps I was going a little far, but it seemed to me that was going outside of the record and telling an untruth, and it was scandalous and impertinent. Anyway I made the motion and it was denied on the ground that what I was trying to do was to file a reply to a reply, a thing which is prohibited by the rules of the Commission; [fol. 7079] and it is a familiar rule that where one party introduces incompetent and irrelevant evidence which should be excluded, the other side is permitted to do the same thing on the same subject. They started it, and we finished it. And so I have two strings to my bow on this.

We certainly have a right to ask for a petition for a hearing and include in it the figures which we would present. It was the same thing as an offer of proof, and in my opinion we were entitled now to have this Court consider it; but if the Court should decide otherwise I direct the Court's attention to the question which I asked the witness showing that it was wholly and totally speculative.

Now, counsel defending the Commission made numerous comments on this matter, ranging from the denial of counsel for the industries that the Commission made findings in the matter, to the contention of counsel for the Commission that although the Commission had erred in its prophecy, that the complete answer was that the Commission considered our contention in arriving at its ultimate [fol. 7080] conclusion. Right or wrong, the Commission was right.

Thus, the actual fact that the Commission committed error in determining the so-called estimates conservative was not denied. Thus, as to five of our most important contentions, which I have outlined, the counsel for the Commission has said as to all of them that the Court could do nothing, since the Commission had considered them.

It has been my intention, and the time has slipped by on me, to discuss the questions of car supply, yard capacity, and that competition would be increased. I must forego this. They are all in my brief; but the Court asked me a question whether—about the 250 cars, what that meant, what period of time was to be covered by it. I wish to call attention to the Court to one of the statements of the Commission. The witness testified that transit shed No. 1 could accommodate five ships, and they could produce 3500 cars of traffic, and the Commission quoted that testimony. Then it added the word "daily." It added the word "daily." The [fol. 7081] testimony didn't say how long it would take. The Commission added the word "daily" and based on the facts, and I cannot go into detail, it would mean there would have to be 52 cars switched into that facility, unloaded, loaded, and switched out, every 42 minutes. That was the expertise of the Commission as applied to this case.

Now, there are only two other matters that I want to discuss, and I will have to do it very, very quickly. The applicants tried to keep the Rock Island out of this case, on the ground it didn't have any authority to handle foreign traffic, that is, all the traffic they were going to handle. They lost. We were admitted.

We asked the Commission to exclude evidence as to foreign traffic. The Commission overruled us. We have asked from time to time for the applicants to explain what they were after and what they were doing, why they tried to keep us out, with never any success; and I asked in my reply brief to them to answer two questions: what was the ground for the opposition to our intervention, and what was the proper construction of the paragraphs of the op-
[fol. 7082] position quoted above.

I would like counsel to answer those questions, and in order there may be no misunderstanding as to what the questions are I would like to hand to the Court three copies of the questions and the paragraphs in question.

One other thing: the applicants filed a revised lease which provided for payment for loaded cars, revenue cars to the District. The Commission said it provided for payment for loaded and empty. Counsel for the applicants said it did provide for payment for loaded and empty, and I would also like to give to counsel a copy of the paragraph in question which I will—part of which I will read. It is Section 2, Article 3:

"The total rental payment in any calendar year shall not exceed an amount equivalent to $2.00 per revenue car or locomotive handled to and from the property during the year."

Counsel has told the Commission that that paragraph provided for the payment for empty cars. I would like to
[fol. 7083] hand these three to the Court so that when counsel, if he does explain the matter, the Court will have before it the documents which he is construing. Thank you.

Judge Connell: That leaves the Plaintiff something like 40 minutes instead of 30? Does it not?

The Clerk: That is right.

Judge Edwards: All right, gentlemen.

[fol. 7084]

ARGUMENT BY MR. BURK ON BEHALF OF THE UNITED STATES AND THE I.C.C.

May it please the Court: you have here today for review the actions of the ICC in granting to a group of railroads the right to provide service to the facilities located at, and to be located at, Lake Calumet Harbor—a large public port under development by the Chicago Regional Port District as the future major deep water port facility of Chicago.

This decision of the Commission was actively and unanimously sought and supported by widely divergent interests and opposed only by the two railroads which are the plaintiffs here today.

This decision does not represent the usual case of a shipper supporting a carrier or carriers applying for authority to provide additional service at his existing plant to cure an alleged inadequacy of existing service. Nor does it represent such a case at a new plant whose future service needs can be accurately ascertained in terms of pounds or carloads of production and new materials per day moving [fol. 7085] in scheduled shipments from and to fixed points and territories.

Rather, this decision represents the case of a well-thought-out, long-range plan of development of a new major port facility, and domestic traffic interchange point, which should ultimately greatly affect and change traffic patterns in a large area of our country as well as generate large amounts of new traffic. In such a case, the record is often conflicting, the usual measurements are difficult to make, statistics necessarily become both the basis for and the creature of greater amounts of prophecy, the issues increase in complexity. Yet, a decision must be made. Here the Commission has concluded that if this vast new facility is to reach the potential that it may reasonably be found to possess, it must now be guaranteed the new service applied for. Thus the Commission has found both that the harbor area, as ultimately developed, will require the

service authorized, and also that the harbor area needs the guarantee of that service now for that development to [fol. 7086] take place.

Plaintiffs disagree with that decision and ask this Court to set it aside. To that end, plaintiff Rock Island has engaged in what may be termed a shot-gun attack on the Commission's action. On the other hand, plaintiff Nickel Plate seems mainly to complain of the Commission's refusal to hold a further hearing sought by Nickel Plate and Rock Island. Both plaintiffs premise their arguments on an attempt to distort our position as to the scope of judicial review and the discretionary authority of the Commission.

This case has been exhaustively briefed, therefore it will be our purpose here today to:

(1) Briefly set the record straight on our position as to the scope of judicial review.

(2) Discuss the basic elements of the Commission's decision and the adequacy of the findings under our view of the law to support that decision.

(3) Discuss the attack on the adequacy of the ICC findings predominately the allegations of error made by Rock [fol. 7087] Island.

(4) Discuss the allegations of procedural error made, predominately, by Nickel Plate.

I will be followed by Mr. O'Brien, representing the intervening railroad defendants, and Mr. Myers representing shipper interests. We have divided the various points between us to eliminate as much repetition as possible, and between us we cover all of the allegations in reply briefs.

Mr. O'Brien will deal primarly with the questions of:

(1) the adequacy of the record to support the Commission's findings and

(2) plaintiffs' attack upon the feasibility, costs and adequacy of the plan of service approved by the Commission in response to plaintiffs' attacks on that plan of service.

Scope of Review

Both plaintiffs in their reply briefs have distorted our statements as to the scope of review by this Court. Having thus created some straw men, they proceed to knock them down.

On Page 4 of its reply brief, Rock Island incorrectly [fol. 7088] states that defendants "argue that the Commission has discretion and that its decisons are therefore beyond the reach of this Court." Rock Island then proceeds to devote six pages (Pages 9 to 14) to first build and then destroy this straw man. Rock Island carries this so far as to state on Page 11 that it assumes defendants "would stand on the proposition that even if the Commission misstates the facts, and bases its decision on the misstatement, its decision would still be binding." Counsel then proceeds to promote this "assumption" into an alleged "assertion" by us and states the cases we cited do not support such "assertion." Of course, they do not, primarily because we never made any such assertion.

The assertion which we did make, and which we do stand upon, is that even if the Court should differ with the Commission as to the judgment to be reached upon weighing the facts, if it should differ as to the wisdom of the decision reached, if it should differ as to any inferences drawn from the facts it still may not substitute its judgment and its [fol. 7089] view of what is wise for that of the Commission so long as the Commission's judgment finds warrant in the law and rests upon adequate findings supported by substantial evidence. This is the rule which has been repeatedly enunciated by the Supreme Court and the District Courts in innumerable decisions. For instance, as the Court succinctly stated in Riss and Co. v. United States, 100 Fed. Supp. 468, 483 (1951, affirmed 342 U.S. 937, rehearing denied 343 U.S. 937, a suit to set aside orders of ICC denying Riss certain operating rights Riss claimed under "grandfather" clause of Section 206(a) and claimed purchased from another carrier:

"The Commission is the fact-finding body. The Court does not make findings of fact, but simply determines whether or not the Commission's findings are supported by the substantial evidence. Although the Court and the Commission might differ with respect to the weight of the evidence, or what the evidence reveals, yet that does not give the Court the right to decide whether or not the Commission is mistaken in its finding, if there is substantial [fol. 7090] evidence upon which to base those findings. In reviewing the evidence there may be instances where our finding would be different from that of the Commission, but we have no authority to substitute our opinion for that of the Commission, anymore than an appellate court has the right to substitute its views as to the facts for that of a trial court or jury."

Plaintiffs also complain (see Page 12 Rock Island reply brief) that "the Commission recited much of the evidence but omitted a great part of the evidence opposed to its views." From this statement and our reply that the Commission need not set forth a catalogue of every piece of evidence in the record, Rock Island again creates a straw man by contending our position is that the Commission need not set forth any of the facts it considered. Again, this is a patent distortion of our position that hardly merits reply. Our position was, and is, as succinctly stated in the Columbia Transportation Company case cited in our brief (page 44), and the authorities listed therein:

[fol. 7091] "It is only necessary that the essential basis of the Commission's order appear in the report so that a Court can satisfy itself that the Commission has performed its function. * * * We do not think it necessary that the report set forth that they considered certain evidence and did not consider it controlling."

To argue that for this Court to perform its function the Commission must catalogue and summarize in its report every piece of evidence and every contention both pro and con to its findings, is really to argue that this Court has the duty to re-weigh the evidence. There is no other pur-

pose for such catalogue. Indeed, this seems to be the basic theme of plaintiffs on this point. As we have previously pointed out, that is not the function of the reviewing Court.

Plaintiff argues that under the APA and the Universal Camera Case, (Page 13 Rock Island reply brief) the Court must consider the evidence cited and found as fact by the Commission against the body of evidence opposed to the Commission's view. We agree. But, such consideration is [fol. 7092] for the purpose of determining whether the evidence relied upon is substantial—more than a mere scintilla—and not for the purpose of re-weighing that evidence to see whether the inferences drawn by the ICC, or conclusions reached by the ICC are unwise in the opinion of the Court.

[fol. 7093] Judge Edwards: You have this point adequately briefed, have you not?

Mr. Burk: Yes.

Judge Edwards: I would like to ask a question. I will address it to you, but I would like to address it to the others, including those heard and who are going to be speaking in rebuttal.

It seems to me we have two questions in this case. One is whether there was substantial evidence to support the general plan which the Commission approved here.

Mr. Burk: Yes.

Judge Edwards: The other is the due process question.

Mr. Burk: Yes.

Judge Edwards: Now, the first question apparently could be debated in relation to the operation of that plan, right up to the point—I am trying to find a point on the map. In any event, the point where the—point "E", isn't it, where the tracks enter the Port District? It is on the other chart that I was looking at before.

[fol. 7094] The question I would like at some point for you to deal with when it fits into your presentation, whether the failure of the description of the operation inside the Port District past the point "E" in the original applications, and in the testimony before the hearing ex-

aminer, probably violated substantial rights which the Plaintiffs, both original and intervening, had in this proceeding.

Mr. Burk: Yes, later on I had it in mind—

Judge Edwards: It was completely overlook in the original. You didn't even contemplate operations within the Port District?

Mr. Burk: Yes, the point was this: there was a very real legal dispute between the applicants and the protestants whether or not authority was necessary.

Judge Edwards: That is what I mean, yes.

Mr. Burk: There was even—they put this in evidence so the Commission could see the plan. They didn't apply [fol. 7095] for such authority because the applicants didn't feel they needed authority.

Judge Edwards: They didn't apply for it?

Mr. Burk: Have not.

Judge Edwards: Well, I think that I ought to tell you this is a matter, in my mind at any rate, is a substantial question—in this fact, because the fact there was no hearing on the operation inside the Port District when it was apparently going to be subjected to multiple use by multiple railroads. It strikes me as a matter of some importance.

Mr. Burk: It was heard, we have pointed it out in brief. This question was heard. It was in the hearing.

Judge Edwards: The operating agreement was heard at the hearing? It was placed in evidence? It was an exhibit?

Mr. Burk: I will get you the exhibit number. It was put in by the applicants during the hearing, and they were given permission to cross-examine.

Judge Kalbfleisch: Isn't it a fact the first application [fol. 7096] requesting authority was only up to the Port District line?

Mr. Burk: Yes.

Judge Kalbfleisch: And it was objected to. They objected to the application—that the application did not re-

quest authority to operate within the District, but you went ahead?

Mr. Burk: That is correct.

Judge Kalbfleisch: I mean, you admitted evidence concerning the operations within the District without this authority?

Mr. Burk: That is correct. You have to have a whole plan.

Judge Kalbfleisch: Well, you allowed the application to come into the District, to be filed at a later date, and then granted the application without any further hearing, isn't that a fact?

Mr. Burk: Yes.

Judge Kalbfleisch: That is what he said you conceded, and that is your due process.

Mr. Burk: Well, if you will permit me to proceed I will make it clear.

[fol. 7097] Basically, the question before the Commission was whether applicants proposed plan for service to the Port is or will be required by the present or future public convenience and necessity. But, because no section of the Act could encompass the whole plan, and because the original applications were technically deficient, separate approvals of separate portions had to be granted under different sections of the Act and at different times. Yet, since it is one plan, the approval of any part rests basically upon the record showing for a need for the whole under Section 1(18). This is the approach which the applicants and the Commission adopted, and which plaintiffs' attack here obscures, particularly in their arguments about so-called "pre-judgment." The Commission made this basic finding that "the public convenience and necessity require the service of the applicants' at Lake Calumet Harbor," in its original report (Page 529 and see later reports). Thereafter, in the original report, and on that basis, the Commission approved, with one exception, the mechanics of the plan by appropriate findings on its part under [fol. 7098] Sections 1(18) and 5(2). Thus, the basic over-

all issue was settled in the original report and the later proceedings dealt only with the mechanics of the plan—specifically (1) the approval of operations within the Port which had been withheld pending perfection of the applications on that point and (2) approval of certain changes in the terms and provisions of the agreement covering that phase of the plan.

With the foregoing in mind let us now turn to the adequacy of the report to sustain the Commission's basic decision. For this purpose, there is no adequate substitute for reading the entire report of the Commission. We respectfully urge the Court to do so to see the many elements considered, weighed and valued by the Commission in reaching its ultimate conclusions. Additionally, time will not permit, nor would it be useful to the Court for us to here repeat the highlights discussed in our brief at Pages 18 through 28. Instead we will here discuss the findings only in the light of, and by way of answer to the many [fol. 7099] allegations of error raised by the plaintiffs—specifically the Rock Island.

The Commission's original report is the product of human beings, who, of course, are not perfect. Considering this and the pressures of producing the vast numbers of reports written by the Commission each year, and the length of this report, it would indeed be unusual if it were absolutely perfect in every detail. We have here some 38 pages of discussion and findings. Counsel for Rock Island have obviously gone over this report with a fine tooth comb, yet all they could find to complain about is a list of criticisms, as to relatively minor points as the basis for their main arguments. In some instances these criticisms involve language which we readily admit could be improved. But the point is that if such improvements were made they would not produce a different result. Thus such language does not form the basis for a claim of prejudicial error. We submit that these criticisms are of a hypercritical nature, are blown up all out of proportion to their merit, [fol. 7100] are in many instances patently incorrect, and in

the last analysis, serve only to point up plaintiffs' inability to assail the essential basis of this decision.

Plaintiffs' fundamental attack on the basic findings of the Commission proceeds upon a misreading of the law. Nowhere is this more apparent than in the peculiar statement that (33 R.I. reply):

"Future public convenience and necessity can be considered later, when, if ever, it becomes present public convenience and necessity."

Section 1(18) of the Act is in the alternative. It speaks of present or future public convenience and necessity. Plaintiff would have this court read "future" out of the Act.

Again Plaintiffs argue that the Commission cannot grant approval unless it finds Rock Island's service is now or would be adequate (16, 26 R. I. reply). Here plaintiffs would have this Court read "convenience" out of the statutory standard as well as "future."

[fol. 7101] Thus plaintiffs actually ask this Court to read the statute as authorizing certificates only if the service is proven "required by the present public necessity" rather than the actual language of "present or future public convenience and necessity."

Moreover, on this record, that the present facilities at the Port may not now or in the future need additional service is not determinative of the present need for such additional service. The present need is for the guarantee of additional service now as a pre-requisite to the future development of the Port. Thus, the present need here is in a sense merges with the future need for service. Plaintiffs' bald assertion to the contrary (R.I. reply 34), the record is clear that there are many reasons which, considered together, can and do support the rational and logical conclusion that additional service should be guaranteed now.

First of all, the Port is no longer a mere dream of the planners. It is an actuality created by the public will through legislation. Vast sums of money and great efforts

[fol. 7102] have been committed to its completion and success. The Commission noted this (502-3 of No. 1) and its decision in large measure represents its conclusions to both assist the public interest in the successful completion of this public undertaking and to remove various roadblocks to its ultimate success before they could arise to frustrate or delay the project's fruition. Both motivating conclusions are in the highest sense what Congress has enjoined the Commission to do in the phrase "present or future public convenience and necessity" and in the language of the National Transportation Policy.

What are these roadblocks that the Commission sought to remove? Consider, as the Commission did, (517-520 of No. 1) the testimony of the witnesses representing the steamship operators. It is axiomatic that if the Port is to be successful the steamship operators must patronize it. Yet their witnesses made it clear that additional rail service and facilities would be required to justify operation of [fol. 7103] their large ships into this Port (517 of No. 1). Two basic reasons were given.

First, the Port needs to assure the steamship operators a good, fast turn-around experience (519-520 of No. 1). For this there must be adequate hold yards for cars, a sufficient car supply to draw on, and direct delivery of cars to remove delays of interchange.

Rock Island argues (16 R. I. reply) there was no proof and finding that its yard capacity would be inadequate. The Commission made such a finding on Page 528 of its report and Rock Island's own testimony helps prove the point. As the Commission found (501 of No. 1) the Rock Island proposed to build a new yard for 412 cars one and one-half miles from the Port. Therefore, Rock Island recognized its own present inadequacy. And why build a new yard for 412 cars one and one-half miles from the Port when applicants have numerous yards available in close proximity, including as the Commission noted (508 No. 1) the Kensington yard for 792 cars which is one and one-[fol. 7104] half miles from the Port.

On the question of inadequacy of its car supply, Rock Island advanced two weak arguments. First counsel argues (16 R. I. reply) that we "ignored the obligation" of the line haul carrier to furnish cars. We submit that "obligation" and "ability" are two quite different things. The greater the number of carriers serving a shipper, the greater is his opportunity to find carriers who have the ability to furnish cars when needed. This becomes of increasing importance in times of car shortage which recurringly plague our rail lines. Such shortages particularly plague us at grain harvest time and a huge amount of grain is and will be a major part of this Port's traffic as the Commission noted (520 of No. 1). Therefore, as the Commission also found, for example, on this one major source of traffic, approval would permit applicants to retain control of their freight equipment made empty at the Port and return it in fast shuttle service to country elevators for reloading (527 of No. 1 and see 521-522).
[fol. 7105] Rock Island's other argument (20-21 R.I. reply) is that the Commission made a misstatement in saying that, when shed No. 1 was operating at capacity, there would be need for 1750 cars inbound and outbound daily and then used this misstatement as the basis for reasoning that an increased car supply was needed. This is typical of the lengths counsel have gone to in attempting to create support for their contentions.

In the first place, the Commission's statement referred to (518 of No. 1) is not the basis of the Commission's holding on the need for an increased car supply. Other considerations including the need to accumulate cars to the extent of the larger ships cargoes to provide fast turnaround (519 of No. 1) and the needs of the potential grain traffic just mentioned support the conclusion. In the second place, as indicated at the outset of my argument, this is one statement that we readily admit could be improved by re-wording. But, even if it were re-worded to clearly indicate that what it meant is that at capacity, with five [fol. 7106] ships always at the dock there would always be

a continuing need for 1750 cars, although it would physically be impossible to run that many in and out daily, no difference requiring reversal of the over-all conclusion would result.

The second major point the vessel operators made and the Commission noted, was that availability of cargoes would determine whether service by them to the port would be justified (517 of No. 1). On this point, Rock Island charges that the Commission's finding (527 of No. 1) of better competition is a "sterile" finding, (34 R.I. reply). This is clearly not the case. Competition by and between applicants can produce the needed cargoes as the Commission noted (523 of No. 1) they will have a greater incentive and interest to make available to the midwestern shippers and receivers on their lines more favorable import and export rates to this Port. This will also be true on grain since they will be able to retain their cars and eliminate extra classifications and interchanges (see 521-522 of No. [fol. 7107] 1) with attendant delays.

On this point of more favorable rates, Rock Island erects another straw man. It argues (41 R. I. reply) that the Commission should deny the applications because applicants will give more favorable rates to some shippers than to their competitors. Even though in our brief we pointed out the complete lack of merit of such argument Rock Island persists in advancing it. Therefore an additional word is called for by us. Were such discrimination to exist, the Courts have long and repeatedly held a carrier cannot complain of it since the grievance is not the carriers'. See Interstate Commerce Commission v. Chicago, Rock Island and Pacific Railroad Company, 218 U.S. 88, 109 (1910). Therefore, Rock Island cannot raise the point. A shipper can, but none have. If any shipper wishes to do so later he can and he has an adequate remedy under Section 3(1) of the Act.

Before concluding this section of my argument, two other points raised by Rock Island call for a brief specific reply. [fol. 7108] First, Rock Island would have this Court reverse

the Commission because it alleges the Commission erred in finding that all public Port facilities in Chicago are served by more than one railroad when, in fact, Navy Pier is public and served by only one (18 RI reply). In the first place the finding in question covers all Great Lakes Ports, not just Chicago, and that Plaintiffs find one exception is immaterial. Moreover, this finding is just one part of larger finding covering the pattern of multiple rail service to Port facilities along the east and west coasts, Gulf of Mexico, and Great Lakes (521 of No. 1) and the benefit of such multiple service. Viewed in context, if the Commission erred on this one pier, it is hardly prejudicial error.

The second point is that the Commission erred by misstating the facts when it said that the tracks of the South Shore would not be occupied for a longer period of time than at present (20 R.I. reply). Again we readily agree a different choice of words should have been employed. [fol. 7109] But, in context, (see 512 of No. 1) the sentence appears as a denial of plaintiffs' argument that the applicants' trains could not fit into the schedule of trains on the South Shore. Such denial is proper in view of the record (transcript 428) that approximately 50 minutes out of almost every hour of the day are available for such trains. Therefore, again, a change in the wording would not produce a different result.

Time will not permit me to proceed further on the question of the adequacy of the Commission's findings. We urge the Court to review the entire report. We are confident that on doing so you will agree that the report is entirely adequate to support the conclusions reached and that such conclusions adequately support approval of the applications.

Procedural Questions

As we pointed out on brief, and in the opening of my argument today, the question of whether applicants additional direct service to the Port should be granted was determined in the original report after a full hearing on that

subject. The later procedural steps, reports and orders [fol. 7110] dealt only with questions as to the mechanics of the plan to provide that service. Plaintiffs attempted repeatedly to use these later limited proceedings to get the Commission to hold further hearings on and reconsider the basic question, but the Commission refused to do so. Now plaintiffs charge that these refusals were procedural errors. Plaintiffs also charge that the refusal to hold further hearings on the plan of operations was an abusive discretion and procedural error.

On the first point, alleged refusal to bring record up to date, plaintiffs in essence argue that although the fundamental finding of a need to approve applicants' requests for authority to serve the Port directly was made after a full hearing in the original report, the fact that the proceeding continued several years thereafter on questions of the mechanics of the plan of service gave plaintiff some right to have the basic question reopened to bring the record up to date on that point and have it re-litigated. Nowhere is the error in this position more apparent than in the fact [fol. 7111] that the plaintiffs are forced to rely upon the old Santa Fe case which has since been repeatedly rejected by the Supreme Court as authority for such a position. As we have pointed out on brief (Pages 35-39) reopening is a question committed to the Commission's discretion and only the clearest abuse of such discretion can warrant this Court to interfere. No such showing has been made.

Essentially plaintiffs argue that they can show that the traffic has not yet lived up to the estimates. The arguments on this point are both weak and inconsistent.

For instance, they argue this cannot be a case of fluctuating conditions. Yet later, at Page 31 R. I. reply, in connection with another argument, Rock Island inconsistently relies upon the "ups and downs of export and import traffic generally."

This is used by R. I. to attempt to refute our argument about the effect on future traffic estimates of the fact that applicants have not yet been permitted to serve the Port (31 R.I. reply).

[fol. 7112] As to our point of the effect of Rock Island being the only rail carrier presently serving the Port, consider the following. A major theme running throughout the Commission's report is that the guarantee of applicants' service is needed to generate the estimate traffic flow. More shippers would be encouraged to use the Calumet facilities by direct service replacing the delays and costs of present two and three line switches, (523). The applicants would have an incentive to publish rates to and from the Port for shippers and receivers of grain and manufactured products and raw materials on their lines (523-524). Steamship operators will be justified in commencing service at the Port because of the availability of cargoes and the assurance of cars and facilities to provide fast turn-around (517-519). The planned use of the Port facilities as a major storage-in-transit and interchange point for domestic traffic will increase by applicants being there to interchange with each other and other carriers [fol. 7113] (514). These and other factors considered by the Commission will generate the predicted traffic flow. Thus, it is obvious that for the predictions to come true the service must be guaranteed and instituted. Since it has not been guaranteed or instituted, bringing the record up to date on present traffic flow would prove nothing except, perhaps, that the Commission was correct in considering the factors requiring approval of the applications to make the Calumet project successful.

We submit that Nickel Plate's arguments as to the need for reopening are without merit for at least three reasons. First, they take a short-run view of a few years rather than the long view of the Commission.

Second, in connection with this short-run view, they ignore the effect of ordinary fluctuations in import-export traffic and the effect of the fact that multiple rail service is still neither guaranteed nor in operation.

Third, they rely upon a theory based upon a case which in [fol. 7114] the light of later decisions cannot support their view. In all of these errors they put the cart before the horse by arguing the traffic must precede the grant of

authority whereas the record is clear that in this case the converse is true. We submit that the Commission did not err in exercising its broad discretion to refuse to reopen and reconsider its basic finding on public convenience and necessity.

On the question of the Commission's refusal to hold further hearings on the plan of operations, we have shown on brief, and the Commission made clear in its first supplemental report, why no such hearings were needed (Brief, 7, 28-34; 312 ICC 280-281). We will not burden the record with oral repetition of that argument. However, plaintiffs now advance a misleading procedural argument to which we feel specific reply is now required.

Nickel Plate argues that the Commission could not procedurally issue the supplemental report and order approving the supplemental applications (for authority to operate over the Port District tracks by lease) without [fol. 7115] first having a hearing on those applications. Nickel Plate now argues (see 31 and 36 Nickel Plate) that Section 5(2) gave them a right to a hearing and required a hearing on that plan unless the Commission finds, which it did not, that such a hearing is not necessary in the public interest. But, Section 5(2) applies in express terms only to the acquisition of trackage rights by one carrier over another carrier's line. The Port District is not a carrier. That is why the Commission stated in its original report that the additional authority must be applied for under Section 1(18) as plaintiffs then contended (525-526), and why the plaintiffs request for a further hearing were denied under Section 1(18) (212-First Supplement Report at 280). There is no merit in plaintiffs' argument since Section 5(2) does not apply to this part of the proceeding.

One other procedural point requires specific mention. Plaintiffs argue that the Commission could not approve the trackage rights of applicants over the track to be—

[fol. 7116] Judge Connell: I wish to ask a question. I am very concerned about this increased traffic flow the

Commission is expecting to bring about. Do you have any idea the degree to which the traffic flow of coal and iron ore is reduced in this part of the country?

Mr. Burk: I don't believe—I don't know. I couldn't give you figures.

Mr. O'Brien: There is no iron ore or coal involved in this at Chicago.

Judge Edwards: Counsel, it may be accurate that the statutory provisions which you have cited do not grant the Plaintiffs here a right to a hearing on the issues—issue of operations inside the Port District.

Mr. Burk: Yes.

Judge Edwards: —but they are relying on the Constitution, and the Constitution applies to them as well as everybody else.

Mr. Burk: Yes.

Judge Edwards: Now, I am not saying these are the facts, but assume for the moment they might be. We have [fol. 7117] here, basically, an argument between eight railroads, one was serving, and was in the position to hope to be able to serve, and six wanted to serve. In effect, the Commission has said, "Well, we want them all to serve."

Mr. Burk: Yes, your Honor.

Judge Edwards: Now, thereby, the two that were in closest proximity were, at least, defeated in relation to some of their hopes for the future. I think that would be a fair assumption, regardless of which side of this argument you take.

Mr. Burk: I agree.

Judge Edwards: And as to whether or not the total plan is to be approved, this depends whether or not there is substantial evidence to support the Commission's findings as to the plan, but I don't see how you can get around the Port District aspect, and say to these people you have no right to a hearing as to what happens inside the Port District because of a technicality of the statute.

[fol. 7118] If, for example, inside the Port District the plan was set forth and was approved ended up allowing

them only to take in a half dozen cars a day from Rock Island or from the Nickel Plate, would there not then be a substantial question involved on which they would have a right to a hearing, and assuming this is the origin of their business, why do they not have a stake in this which requires a hearing, regardless of whether or not the statutory provisions provide for it.

Mr. Burk: Well, let me say in quick response, I agree, assuming—I would like to say it is pointed out here in our brief.

Judge Edwards: Was there a request for a hearing?

Mr. Burk: There was a request by the Plaintiffs at all stages for hearings. Yes, I agree.

The point is, there was no change, no basic change, no fundamental change in what they approved the second time and what they said they were going to ask to have [fol. 7119] approved at the original hearing, so why was there a need for a hearing. The only change that did occur, the Commission found later, did not warrant a hearing.

Now, this is a bone of contention, and I am sure Mr. O'Brien will have considerable to say about it.

Judge Edwards: We will now recess until 2:00 o'clock.

(Thereupon court was recessed until 2:00 o'clock p.m., January 24, 1964.)

[fol. 7120] January 24, 1964, 2:00 O'clock P.M.

ARGUMENT BY MR. O'BRIEN ON BEHALF OF THE INTERVENER, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

Mr. O'Brien: May it please the Court, I am William J. O'Brien, Jr. I think the Court has evidenced certain interests in certain questions that were proposed to counsel by the other side. They believe certain issues before us ought to be answered immediately.

First of all, your Honor, there are no facilities at Calumet Harbor for the handling of iron ore, or coal, which were never contemplated.

Judge Connell: We know all about Gary and Hammond.

Mr. O'Brien: Now, the next question had to do with the scope of the application. One of the questions was, did the applicants' application fail to present to the Court their intention to serve the facility at Lake Calumet Harbor. Also, was there any surprise, as Mr. Broker would infer, with respect to what was presented at the hearing?

During the luncheon recess I took the liberty of asking [fol. 7121] that the record before the Commission be brought up here, but rather than delve too much into the abstract, which was furnished by the Rock Island, and would, I think, supply a good deal of the information—Page 338 states, their application states in its first paragraph:

"By this application the Illinois Central and the Pennsylvania and the South Shore seek to extend their operations to serve the Lake Calumet Harbor District."

Paragraph H of the application states: "The proposed construction is required in order that the Illinois Central, Pennsylvania, and South Shore may serve present and future industries, elevators, warehouses, docks, and piers in the Calumet Harbor port area."

It further says: "In the return to the questionnaire"—may I refer to the actual return to the questionnaire here to the application of the Illinois Central, Pennsylvania, and South Shore?

One of the questions is whether the line proposed to be [fol. 7122] constructed, acquired, or operated, would receive material revenue from the territory transversed or serve any material public convenience or necessity of the local territory. That was a regular question propounded by the Commission in a section 1(18) and 5(2) application.

The answer was: "The line proposed to be constructed and operated will receive material revenue from freight traffic to be handled to and from industries, elevators, warehouses, docks, and piers presently operating in the Calumet Harbor Port area, in addition to those facilities to be

constructed with the further development of the area. Public convenience and necessity will be served by the entry into the Calumet Harbor area of additional trunk lines the rail carriers afford that area, direct rail lines with points from the south, east and west."

Now, throughout this abstract it is shown that the remaining applications are treated with the same questions of the Commission. For instance, Paragraph 17 of the return to questionnaire, those applicants—

[fol. 7123] Judge Edwards: Where are you now, counsel?

Mr. O'Brien: Page 4, your Honor, the first complete paragraph. In Paragraph 17 of the return to questionnaire these applicants state that the, "area served by the proposed new extension is to be used for the development of inland port facilities and general industrial development."

Now, rather than to stop there with what was in our application and return to questionnaire, let me read from Rock Island's petition of intervention:

"Applicants seek to extend their lines of the railroad and operations to serve the Chicago Regional Port District which is located adjacent to petitioner's railroad tracks, and is being served by them exclusively. The sole, underlying purpose of the applicants, in extending their lines of the railroad and operations to serve the Chicago Regional Port District, is to divert to their lines traffic handled by Petitioners."

Now the Nickel Plate, in their petition of intervention, [fol. 7124] says: "Petitioner Nickel Plate is opposing the applicants as an unjustified invasion of the Lake Calumet area which is now, and will continue to be, adequately and completely served under both present and future development, by the petitioner and the Chicago, Rock Island and Pacific Railroad Company."

Of course, they differ from the Rock Island. They say they are presently serving. The Rock Island says, "We are serving exclusively," and there is no valid reason, no

law or fact, to extend the line or railroad described in the application into the area exclusively served by said petitioner and interveners.

Now, oh, yes, just to go one step further, the briefs of the Rock Island, the original brief before the Commission said:

"The purpose of the proposed extension was stated to be to reach the port facilities presently, and being constructed, by the Chicago Regional Port District, thus enabling the applicants to serve as a connecting line from interior ports to interstate, foreign and overseas points [fol. 7125] on shipments transshipped from Lake Calumet Harbor of the Chicago Regional Port District."

Judge Kalbfleisch: Is it your position, notwithstanding the failure of notice, and so forth, that the Plaintiffs actually were not prejudiced by having to try the matter, bringing in whatever evidence they wished at the original hearing?

Mr. O'Brien: My position is that the complainant had notice, they admitted they had notice in the petition of intervention. They realized the scope of intervention. They realized the scope of the application.

Judge Kalbfleisch: Whether they actually had the notice they were entitled to is another thing.

Mr. O'Brien: Under the law they are not entitled to specific notice. The Commission does give them notice since they are a party of interest, and they receive notice of these applications, and they filed their petition of intervention; so there was no surprise.

They realized what was being suggested by the appli- [fol. 7126] cants, and we say that we complied with everything, as far as the application was concerned, and the Commission did too.

Now, the point is, when we filed these applications a technical error was committed. That is granted.

Judge Kalbfleisch: Yes.

Mr. O'Brien: Let me point out—

Judge Kalbfleisch: You only went to the borderline of the Port Authority, instead of into it.

Mr. O'Brien: We stated in the application, to this extent, we stated—there is no question in my mind, in anybody's, they all stated here, that the evidence that was presented at the hearing dealt with this business that was flowing through the Port at the present time.

Now, what we failed to do, however, was that in describing the track to be constructed, we described fully the track to be constructed, but we failed, we failed to as specifically [fol. 7127] for authority to operate over Port District tracks.

Now, that was the only distinction, and our map failed to disclose where we asked for authority to operate over the tracks; however, the only explanation we could give at the time was that we did not feel that specific authority was necessary. The Rock Island has been operating over the system without a scintilla of authority, and the Nickel Plate said that they would not go to the Commission and ask for any, but they say we must. We raised that before the Commission, but this is a Court of equity.

One more thing, I think, was raised. I think it was raised by Mr. Dwinell with respect to this lease agreement, or maybe it was Mr. Broker; at any rate, the question was, or at least there was an impression left, that there has been quite a change which may have warranted a hearing on the lease agreement.

Let me first state that at the time the applicants submit-[fol. 7128] ted this testimony, this evidence to the Commission, that the lease agreement, Exhibit H-64—that was submitted to the Commission as an exhibit. The complainants herein had an opportunity to cross examine on it. It was an unexecuted, it was the form of agreement we felt would cover the operation over the Port District tracks.

Judge Edwards: That was the 1957 hearing? Where do you find that in the record?

Mr. O'Brien: Exhibit H-64. It is in possession of the Court right now.

Judge Edwards: Copies have not been furnished to us.

Mr. O'Brien: I don't presume so.

Judge Edwards: This is an original record as filed with the Court that you are referring to at this point?

Mr. O'Brien: That is correct.

Now, at that time, and I am reading from the Nickel [fol. 7129] Plate's supplement to the original brief before this Court. They say the following, and this is on Page 31, Section 2:

"Lessor agrees to lease said leased property to lessees for an annual rental based on five per cent of current valuation as provided in Article 3, Section 1 above. Lessees agree to pay to lessor said rental in equal monthly payments in advance upon the first business day of each month upon receipt of bill from lessor, provided, however, that the total rental payable in any calendar year shall not exceed an amount equivalent to $2.00 per car, loaded or empty, or locomotive handled to or from the property during such calendar years."

This was the agreement between the parties. This was submitted at the time of the hearing. They stated in the order that certain changes would have to be made in the order before they would give authority to operate in Lake Calumet Harbor. They stated it had to be a "non-exclusive use."

There were several features. The Commission said, [fol. 7130] "You conform, and we will give it our blessing," so we did. We changed it in accordance with the Commission's order, and then later on the Port Authority district people decided they wanted to make certain authorizations in it, and they did. We brought it back to the Commission, and they gave it their final blessing.

Actually, this article, this paper that Mr. Dwinell handed to me points out here in Section 2, on Page 4:

"Lessee agreed to pay lessor said rental in equal monthly payments in advance upon the first business day of each

month upon receipt of bill from lessor, provided, however, that the total rental payable in any calendar year shall not exceed an amount equivalent to $2.00 per revenue car or locomotive handled to or from the property during the calendar year."

Judge Edwards: Do these sums correspond to that which Rock Island was previously paying?

Mr. O'Brien: Rock Island doesn't pay one penny today, [fol. 7131] and they have no authority to operate over these tracks.

Now, actually—

Judge Edwards: Well, this would require them to pay $2.00 a car?

Mr. O'Brien: I think it would be equitable under the circumstances.

Judge Edwards: Aren't you entitled to a hearing on that change, where it happens to you?

Mr. O'Brien: The applicants?

Judge Edwards: I am talking about the person who is going to pay the additional $2.00 per car.

Mr. O'Brien: At the present time they have no contract, and are operating by mere suffrance, and they are operating without cost at the present time. It may be one of the things they have in the back of their minds, that, "Here these parties are paying. Maybe we will have to pay." It is possible, but whether or not they would be entitled under the circumstances, I think they could probably go to the Commission and ask them, but that question never has [fol. 7132] arisen, whether or not they would be entitled to a hearing on any rental provision that they might have to pay in the future.

Judge Edwards: Does this lease agreement, as it is currently approved, apply only to the applicants here and no wise makes provision for continuation of service by the Plaintiffs in the case before this Court?

Mr. O'Brien: At the present time—may I elaborate a little, your Honor—the lease provision as I started to say, makes a change in the amount of revenue, the rental that

we are supposed to pay to the Chicago Regional Port District for use of their tracks. The Commission has been very cognizant as to what kind of burden the railroads are going to let themselves in for.

Here it was to the Commission's satisfaction that, as the lease finally was approved of, it was more favorable to the applicants than the one originally submitted. Here [fol. 7133] it only applied to revenue cars. Before it was all cars, whether loaded or empty. This lease provision covers the applicants before the present applicants and the Chicago Regional Port District.

Judge Edwards: The answer to my question would be, the lease agreement would cover any cars subsequently that would use the tracks of the Port Authority—not between the applicants, between any cars. Is that right? You use the term "all cars"?

Mr. O'Brien: In answer to your question, your Honor, this lease was presented to the Rock Island and they refused to sign it, but they were a party to the lease as submitted.

Judge Edwards: It would then cover them if they were prepared to continue to do business under the circumstances?

Mr. O'Brien: That is correct.

Judge Edwards: Yes.

Mr. O'Brien: Now, as I stated before all these features [fol. 7134] amount to one more, and that was the non—it was the centralized supervision agreement; in other words, the plan of operation.

I believe your Honor asked Mr. Broker right at the start —you said, if I remember correctly, your Honor, "What changes were made in this operating agreement?" To this hour I have yet to hear that answer. The reason is obvious. There was no change, and if so, I would like Mr. Broker when he comes up here again, to please tell us what change it was. The only change is that agreement is now executed.

Judge Edwards: Your contention is the unexecuted agreement presented at the hearing, in the 1957 hearing, is essentially and materially the same as that which has subsequently been presented by the applicants and approved by the Commission?

Mr. O'Brien: Exactly, and I will even go further: there is no change whatsoever except the names now appear on the bottom. There is not one scintilla of difference be-
[fol. 7135] tween that which was Exhibit H-64 and that which was finally executed as of September 4, 1959.

Judge Edwards: Let me get clear exactly what exhibit we are talking about.

Mr. O'Brien: All right.

Judge Edwards: Which is the exhibit which was presented which constituted the port district lease agreement in its unexecuted form at the 1957 hearing?

Mr. O'Brien: H-64.

Judge Edwards: Now, the final approved lease agreement of the port district is what exhibit?

Mr. O'Brien: There is no exhibit number. It was tendered to the Commission, and they approved it after the hearing, subsequent to the hearing; in other words, we tendered it to the Commission in conformance with our order stating we must make these various changes, and we submitted it.

Judge Edwards: What do we have before us which
[fol. 7136] deals, from the point of view of the record, with the argument that the Plaintiffs are faced with an entirely different situation than that which was presented and contemplated in the 1957 hearing?

Mr. O'Brien: There are copies, if it is in the Commission's records, how they handled them. I can find out for your Honor, as to what number they gave it. As a matter of fact, I have the original here.

Judge Edwards: Does the Commission's order refer to the document of 1957, H-64?

Mr. O'Brien: Oh, yes.

Judge Edwards: It does.

Mr. O'Brien: Yes indeed.

Judge Edwards: Does it refer to it as the basis for the lease which ultimately was executed?

Mr. O'Brien: It does.

Judge Edwards: Where will I find that in the order?

Mr. O'Brien: I believe I have it right here, if you will [fol. 7137] indulge me a moment.

Judge Edwards: Yes.

Mr. O'Brien: May I ask Mr. Bierma to check, so as not to hold your Honors up.

Your Honors, I would like to hand to your Honors seven exhibits and statements of record which might visibly describe for the Court the project at Lake Calumet Harbor and the impact intervener's proposal, or applicants' proposal, if I may use the term "applicants" will have on its development.

If your Honors please, you have been most patient, and I shall try to be brief. It does appear to me, having sat through two weeks of hearings and then following the case for six years on various pleadings, and briefs, I may be in a position to tell you something about that proceeding.

Mr. Bierma and I represent the six railroads who were applicants before the Commission, namely the Illinois Central, Pennsylvania, New York Central, Indiana Harbor [fol. 7138] Belt, Belt Railway of Chicago, and South Shore Railroad.

In that proceeding we sought to prove, and apparently did so to the examiner's and Commission's satisfaction, that our plan to serve the facilities located at Lake Calumet Harbor would aid in the development of the Port, and that our plan of operation over the tracks of the Chicago Regional Port District warranted the finding that the present and future public convenience and necessity required the construction of the tracks up to the Port entrance and operation over the Port District tracks, and that the operation over the tracks up to the Port District would be consistent with the public interest.

Lake Calumet Harbor is located in one of the heaviest industrial areas in the world, and it presents one of the greatest potentials for generating traffic in the United States.

The property is publicly owned and leased by the Chicago [fol. 7139] Regional Port District to private operators.

At the present time there is constructed, as Mr. Dwinell pointed out, two elevator operators, several cold storage houses, some backup houses, some warehouses, fourteen miles of railroad tracks, some truck terminals, and transit shed, all on the west side of the Lake Calumet.

Since the hearing, the Union Tank Car Company has started the building of a tank farm on the east side of the lake.

The lakes to the Gulf Waterways System, which was completed in 1933, and the St. Lawrence Seaway, which was completed in 1959, and the Calumet-Sag Channel, which is nearing completion, will make the Port one of the busiest in the world.

If you refer to the Exhibit composite, Exhibit H-1 and H-28 respectively, and Exhibit H-2, which are copies of the plan of the completed port, and also a photograph of the model of the complete port—these illustrate the important bits of evidence upon which the Commission relied [fol. 7140] in making its findings that the present and future convenience and necessity warranted the granting of these applications, and also upon the testimony of the shipper.

At the time of the hearing over $24,000,000 was spent on the initial development of the Port. Shippers, port, and public officials, all testified that the development of the port would depend upon, greatly upon the outcome of this proceeding, and whether or not the Commission granted the approval of the applicants to put this service into effect.

After an exhaustive review of the record, the Commission made the following findings of fact:

Approval of the applications would result in greater rail competition, better service, greater car supply, and lower rates for the industries at Lake Calumet Harbor.

Regarding the greater car supply, the statement before your Honors, which is marked No. 5, show at a glance the impact that this evidence had upon the Commission. There [fol. 7141] it can be seen that the total equipment of the applicants, excluding the South Shore Railroad, was 900,000 cars as contrasted with 30,000 cars of the Rock Island.

Regarding lower rates and better service, several witnesses testified that a good deal of traffic was lost to trucks, at Lake Calumet Harbor because it involves two or three line hauls.

Now, if your Honors will refer—we have a blown up copy, but it is an exhibit marked H-30, which describes the impact the Commission found the applications would have upon the shippers that were in the Chicago switching district.

Turning down to the first overlay, you see there the lines of the Rock Island in proximity to the Port, but turn down to the second overlay, you see the lines of the Nickel Plate in proximity to the Port.

Next, by turning down the third overlay you see the lines of the applicants herein and their proximity to the Port, and the fourth overlay shows the lines of the proprietary [fol. 7142] owners of the two belt railways and their proximity to the Port.

At the present time, of the 5,628 industries now located in the Chicago switching district, only 186 presently enjoy single-line, lower cost service to the Port.

With the advent of the service being offered by applicants here 1,917 more industries would receive single-line service to the Port, and three lines switches would be eliminated.

One more thing they found, and that was that the Rock Island interchanges with 15 trunk line carriers that enter Chicago. On the other hand, the two belt lines, which are applicants herein, interchange with all 31 trunk lines entering the Chicago switching district.

Now, referring, if your Honors will, to the other overlay map marked Exhibit H-31, we see the impact the proposal of the applicants will have upon the service from the Port to all points in the United States and Canada.

[fol. 7143] I might say this, dropping down to the first overlay we see the entire lines of the Rock Island railroad, dropping down to the second overlay, we see the line of the Nickel Plate, the third overlay we see the lines of the applicants, and the fourth overlay shows the lines of the proprietary owners, the Chicago Belt Railroad and the Indiana Harbor Belt Railway. There, by means of a single interchange, shippers at Lake Calumet Harbor can reach all points in the United States and Canada.

Now, in making its finding of the greater reliance on competition the Commission noted that Port shippers and public officials all stressed the value of rail competition and the effect it would have upon the development of the Port and the effect upon the industries at Lake Calumet Harbor.

The president of the largest terminal company in the world testified as to his experience with respect to rail competition. North Pier Terminal had some facilities at 29th and Western in Chicago which they had to abandon [fol. 7144] because it had only one railroad service.

It had facilities in Milwaukee which was serviced by the Northwestern exclusively, which railroad also served the Jones Island, which was the site of the Jones Island Municipal Dock and Marine Terminal.

Later the Commission granted authority that the Milwaukee be required to serve Jones Island also, and thus with the facilities, private and public, on Jones Island, receiving the services of two competing railroads, North Pier Terminal, which had only one, could not compete and abandoned its facilities.

Now, the record is clear that the services at Lake Calumet Harbor left something to be desired. The superintendent of the Rock Island testified that they received complaints in the years of 1955, 1956, and 1957. The General Manager of the Chicago Regional Port District testified

that there were occasions when the loads had backed up completely and there was much congestion.

[fol. 7145] The various warehouse operators corroborated the president of the North Pier Terminal as to their service problems and they testified as follows:

"Q. This matter of the Rock Island service, I don't want to have any misunderstanding about it. Have you made any complaints about it from the day you started there?

"A. Yes, we have complained.

"Q. Has the service improved?

"A. Yes, it improved very much.

"Q. When did it improve?

"A. Since this case has been docketed."

Rock Island took no exception to this testimony or to the testimony of the warehouse operators that substantiated it. They refused to cross-examine these gentlemen, and they offered no testimony in rebuttal.

Here is a prime example of where the mere threat of competition practically revolutionized the operations at the harbor. New personnel was brought in, new freight engines, additional switch engines were brought in, but these [fol. 7146] radical changes or improvements left two questions in the minds of the shippers. One, how long would the conditions complained of have continued if the applications hadn't been filed? Two, what assurance has the shipping public that Rock Island will not revert to the inferior service if a monopoly is assured them by denial of the proposals of the interveners?

The Commission next found: if applicants can prove, as they have herein, that the proposed construction either presently or in the near future is necessary to meet a public need, and will be reasonably profitable, the Commission may issue a certificate authorizing the proposed construction. Transportation service which aids in the future development of a territory is in the public interest.

There was additional evidence of fact, undisputed, which the Commission relied upon in making such findings: one, the development of Lake Calumet Harbor is a thing certain. Two, the development of the St. Lawrence Seaway is a thing certain. Three, the track facilities of the Chicago [fol. 7147] Regional Port District are wholly inadequate to service the facilities at the Port of the ships in the harbor. Four, applicants have yard space in proximity to the Port equal to twelve times that of the Rock Island. Five, while the Rock Island has direct interchange facilities with 15 trunk lines in the Chicago switching district, both Belt Railway and Indiana Harbor Belt Railway, applicants, connect with all 31 trunk lines in the district.

In labeling these facts as undisputed it must be pointed out that Rock Island has taken two different positions regarding the port development. On Pages 15 to 25, inclusive, of Rock Island's reply brief, it is alleged that 25 errors of the Commission were left unanswered by counsel for applicants or the Government. Government counsel has already answered Nos. 1, 2, 6, 10, 11, 13, 15, 16 through 25. I shall answer the balance.

Rock Island, on Page 16, of its reply brief before the Court, its error No. 3 questions the evidence as to the fu- [fol. 7148] ture development of the port in stating:

"The whole future of the port is speculative."

Mr. Dwinell said today, he points to the pictures and said, "The dream of what might happen."

They also say in the brief before the Court, "The port is only about ten per cent developed."

But they inadvertently, in the same brief, state, "Now that the harbor is showing signs of development—"

In its brief before the Commission this Plaintiff said it had purchased the Pullman Railroad because "there was the conviction that the Lake Calumet would one day be an international port."

It also said: "The growth of Lake Calumet is assured." Not that it was speculative, it was assured. It wasn't a dream. It was assured.

It described Lake Calumet Harbor as: "This potentially rich industrial area," and it reasoned: "It goes without saying that as the Port develops additional facilities are [fol. 7149] required."

We agree with this wholeheartedly. Now, Plaintiff Nickel Plate never harbored any doubt about the development of Lake Calumet or the traffic to be generated by the St. Lawrence Seaway. Nickel Plate vice-president testified, "The Seaway is a reality and we look forward to the Seaway as a means of generating tonnage from and to the territory which we serve."

From the beginning, and in alleged error No. 5, appearing on Page 17 of its reply brief, Rock Island has belabored the argument that the proposed service would be improvident.

The Commission weighed the evidence presented by both parties and found the proposed construction and operation would be reasonably profitable, a finding we respectfully submit should not be disturbed by the Court, since the Commission alone in its expertise is authorized to decide upon the weight of evidence or significance of the facts.

The Commission further found: "The volume of traffic [fol. 7150] moving through the Lake Calumet Harbor facilities is steadily increasing and the operators of such facilities as well as the Port District, anticipate the traffic volume will multiply many times within the next few years because of the strategic location of the Port and added flow of import and export traffic generated by the opening of the St. Lawrence Seaway."

In alleged error No. 4 on Page 17 of its reply brief, Rock Island alleges that the Commission, in making this finding, ignored the DeLeuw Cather & Company report and the testimony of witnesses, Carpi of the Pennsylvania, Bayliss of the New York Central, and Dr. Fair, Professor of Transportation at Tulane University.

The so-called DeLeuw Cather report was not introduced in evidence, but reference was made to it by Dr. Fair who stated and I quote:

"All I have said about the future of traffic was stated [fol. 7151] merely to show the impossibility of forecasting of traffic with any degree of accuracy. Nothwithstanding what I have said, Lake Calumet Port, as I have said before, has a promising future because of a good plan, room for development, territory for which to draw, and presence of bulk commodity traffic.

All Mr. Carpi and Mr. Bayliss said was that they were in no position to make forecasts of future traffic. They were leaving that to Port and shipper witnesses.

The Commission, on the other hand, noted that while all shippers, port, and public witnesses forecast a rapid development of the port with the advent of the rail service proposed by applicants, the general Manager of the Chicago Regional Port District, based on his years of experience in the management and operation of public harbors and marine terminals, made what he considered conservative estimates of future traffic.

The statement marked No. 3, before your Honors, briefly [fol. 7152] reflects his testimony. He anticipated a movement during the first two years in 1957 and 1958 of 27,000 loaded cars. In the second period, based upon the added service to be obtained through the granting of authority, the manager of the Chicago Regional Port District estimated a movement of 76,500 loaded cars.

Now, as I say, while this estimate was criticized roundly by complainants, he was actually conservative in view of the testimony of the public witnesses and shipper witnesses that followed, and the other shippers at the port.

Now, while the Rock Island has questioned the weight to be given such testimony, they find themselves in this embarrassing position:

In the original order of the Commission they quoted the Rock Island as stating that they would suffer a possible loss of $345,964.00 revenue based on 1955 traffic if these applications were granted, but Rock Island came along and said, "This is wrong. This is much greater now," because

[fol. 7153] in this petition for reconsideration Rock Island stated its potential loss now, since the year April 1, 1959 to March 31, 1960, its traffic at the port totaled $818,062 in revenue.

As counsel for the Commission stated, there is no substitute for a review of the Commission's order to be convinced that the record before that body warranted the action taken by the Commission, the granting of the applications.

Following the course of the proceeding and particularly the events subsequent to the issuance of the Commission's initial order, it became apparent that Plaintiffs herein in a series of some 35 pleadings, which we have described in our brief, abandoned hope of dissuading the Commission on the basic issues relating to the present and future public convenience and necessity and instead chose to attack the order purely on a procedural technicality or a collateral issue.

The alleged errors contained in Rock Island's and Nickel [fol. 7154] Plate's reply briefs are typical. On Page 18 and 19, Nos. 7 and 8, Rock Island alleges that no applications were filed for authority to serve Calumet Harbor terminals. Mr. Broker made the same allegation this morning, and the Nickel Plate makes the allegation on Page 35 of his brief.

To further prove its point, Rock Island states the Commission is so much in error that it erred when it said the Rock Island had the right to serve the west side of the lake and the Nickel Plate had the right to serve the east side, because they had filed no applications for such authority.

This is the Rock Island saying this, and we agree, but nevertheless, any kind of cursory glance at the application filed by the applicants describing their desire to serve the facilities of Lake Calumet Harbor and the return to questionnaire, and a glance at the map showing that the proposed tracks serve Calumet Harbor Terminal, Inc., and a brief resume of the testimony of the vice-president of the [fol. 7155] Calumet Harbor Terminals, Inc., requesting the proposed service, should dispose of this allegation once and for all.

Again, on Pages 21 and 22, the Rock Island contends that the Commission ignored the evidence that the Port District's yard was grossly inadequate when it approved the proposed plan of applicants regarding the joint facility arrangement. The statement of the Commission, on Page 528 of the initial report of October 5, 1959, repudiates this. There the Commission stated:

"The volume of traffic moving through the Lake Calumet Harbor facilities is steadily increasing, and the operators of such facilities as well as the Port District, anticipate the traffic volume will multiply many times within the next few years because of the strategic location of the Port and the added flow of import-export traffic generated by the opening of the St. Lawrence Seaway. A vast amount of railroad yard space will be necessary for the expedited and [fol. 7156] efficient handling of such added traffic. The applicants have yard space in proximity to the Port equal to twelve times that of the Rock Island."

On Page 24, Rock Island treats with the agreement between the applicants and the Port District. Briefly stated —I believe I covered that, I won't use time on it.

I would like to refer to the Nickel Plate's reply brief in which they claim there was certain questions we failed to answer. I will answer those.

They state there that the applicants failed to file a lease between the Port District and the P. B. & W. Railroad for occupancy of the District property. Well, actually, the answer is very simple to that: there is no requirement that a railroad file with the Commission a lease covering land alone, but there is a requirement that certain information be disclosed to the Commission as to the value of the land when you seek to construct tracks over certain property, and it may be seen on this exhibit, E-3, land for transporta- [fol. 7157] tion purposes, $134,300. The Commission forthwith approved the application which required the construction of the track.

Now, the second one, on Page 34, stated that the supplemental application filed in 1960, and the petition for approval of the non-exclusive use agreement, filed in 1961, did not comply with the ICC rules as to information required.

The information required, as we have stated again and again, and the evidence was already before the Commission, there was nothing different that we could possibly have submitted to the Commission with respect to the lease or the method of operation. It was already before the Commission in 1957—the exact same method of operation they later speak about. All we did was merely filed a lease agreement in compliance with the Commission's order.

No. 2, Page 49 to 50, they state there the applicant needed the Port District's consent to the centralized supervision agreement. The Commission had one dissent on this, and we questioned it to know whether or not it was [fol. 7158] necessary to have the Port District to consent to this particular agreement; nevertheless, we complied with the Commission's order immediately, and we had the Port District's approval of our plan of operation, which was the same one that had been entered back in 1957, and that is the distinction between the original and the one that was finally accepted.

Judge Edwards: What was the distinction?

Mr. O'Brien: That this was executed, and it showed approval by the Chicago Regional Port District on the original.

Judge Edwards: You claim those are the only distinctions between the executed agreement and the one proposed at the 1957 hearing and ultimately referred to by the Commission in its order?

Mr. O'Brien: Exactly.

Again, I ask, and perhaps Mr. Broker can find a difference, but I would like to know it—No. 35, Page 34.

[fol. 7159] Judge Edwards: Counsel, do you perchance have now a means by which you can refer us to a portion of the record where we can ascertain by a comparison of the

two documents, or a detailed statement of the Commission and its order, so as to check the contention you have just advanced.

Mr. O'Brien: Can I supply this at the end of the argument?

Judge Edwards: Yes.

Mr. O'Brien: I will say this—if not, we can supply it. It is available. It is a case of digging it out.

Now, the Nickel Plate, in omission No. 5, as they call it, allege the ICC prejudged the lease and supervision agreement. As stated before, the only change in the lease from the original, and that will be shown here, that was the rental was more favorable to the applicant than the original, and the only change in the centralized supervision agreement, as I said before, is that it was executed, and [fol. 7160] the Chicago Regional Port District's general manager's name appears thereon.

No. 6, the Nickel Plate mentions the applicants originally opposed each other. That is true. They did, but they got together and filed applications and got together at the hearings.

In contrast, until the examiner came out with his proposed report to the Commission, Rock Island refused to recognize any right in the Nickel Plate to serve the facilities at Lake Calumet Harbor. They stated they were handling it exclusively, and they were capable of continuing to handle the traffic there exclusively. It was only after this report came out that the Rock Island decided it was probably better to share its pie with one instead of seven.

Now, the reply briefs do not discuss the applicants' pleadings limiting their requested authority to import-export traffic. Well, the Commission decided they would hear the case on the application and stated, as far as they were con- [fol. 7161] cerned, some particular pleading would not limit the scope of the application, and, as a matter of fact, they denied this particular pleading, so it could be discounted.

No. 9, Page 35. The Nickel Plate alleged the applicants failed to submit evidence as to the cost of the operation.

I think that was covered in the question of improvidence. There was voluminous testimony that was submitted by all parties of the applicants as to the ease of operation. The Commission took note of the facts that they had yards in close proximity and could get from their yard to the port in little or no time.

Those were the things. This time the Commission and its expertise decided the plan was workable and it was profitable.

No. 11, Page 35, Nickel Plate says the applicants executed a different lease agreement. I think we have gone into that, and it will be shown the extent of the difference.

We have complied with every particular wish of the [fol. 7162] Commission. We have done everything they suggested to us in order that we would be able to go ahead and perform the service they felt was necessary in order to afford the facilities, present and future, at Lake Calumet Harbor with the proper service. We ask your Honors to find that the order of the Commission was lawful.

I would like to cite one case: Kuhn vs. Civil Aeronautics Board, 183 Fed. 2nd., Pages 841 and 842. There it states:

"It is now generally accepted that there may be no subsequent challenge of the issues which are actually litigated, if there has been actual notice and adequate opportunity to cure surprise. If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern."

[fol. 7163] Counsel suggests that we refer to Page 31 and 33 of Government's brief. Thank you, your Honors, for your patience.

Mr. Bierma: I can give the reference you were asking for. Exhibit H-64 is discussed in 307, ICC, at Pages 503 to 505. Also it is discussed at Page 525. On this last page the Commission found the applicant should file a further application.

In 312, ICC, 273, they cover the revised lease which was submitted to the Commission, and that revised lease is attached to the application, dated April 4, 1960—the final lease as approved by the Commission.

Judge Edwards: ICC, Page 273, the special report covers just this matter then.

Mr. Bierma: The Commission's report, as corrected, dated November 26, 1962, is the final Commission's report and covers a lease which was attached to our petition of November 27, 1961.

Now, with reference to the centralized supervision agree-
[fol. 7164] ment, H-29, that was submitted to the Commission formerly with our petition of September 25, 1962, and is also covered by the Commission's report, as corrected, dated November 26, 1962.

Judge Edwards: Are these references any place in your brief?

Mr. Bierma: I am sure they are, and a good many are contained—

Judge Edwards: Can you designate where?

Mr. Bierma: References of course are made in our briefs —are made to these various documents.

Judge Edwards: Do you have H-64 in the court room here in your hands?

Mr. Bierma: It is in the big box there.

Judge Edwards: It seems to me it is a most material problem before us, and some place or other the three judges ought to be able to have a chance to look at it.

Mr. Bierma: In the documents of the Nickel Plate file
[fol. 7165] there is a copy of our petition that went to the Commission in which we show the changes that were made from H-64 on through.

Judge Edwards: In the documents—

Mr. Broker: May I interrupt, at this point. That document you have in front of you contains the text of the supplemental application made in 1960, the petition for approval of the use agreement. It also shows Exhibit H-64, which was the lease submitted at the hearing, and

it also shows the changes made by the modified lease approved in 1960.

Judge Edwards: Good, I have just been looking for this in the hands of the wrong party. It seems to me the Government and the applicants should have presented this.

Mr. Broker: We thought it was on our side. We put it in.

Mr. Bierma: Mr. Broker kindly prepared our petition also.

Mr. Broker: So that you have a direct comparison and [fol. 7166] a different type of exhibit, H-64, as submitted at the hearing, and the modified lease, as approved, and immediately following it is the non-exclusive use agreement, which they would put into effect now.

Judge Edwards: Thank you, sir.

[fol. 7167]

ARGUMENT BY MR. MYERS ON BEHALF OF THE CALUMET HARBOR TERMINALS, ET AL.

Mr. Myers: May it please the Court, my name is Charles Myers. I represent the warehouse and terminal operations, at Lake Calumet Harbor.

I think I should make it clear at the outset of my presentation that we have not concerned ourselves in the pleadings before the Commission or in any of the hearings with how the mechanics of the applicants' proposed service will work; that is, how they will use our yards to facilitate the move into the Port. We are content to rely on their ability as railroads to furnish us with adequate service if they are authorized to do so.

Nor do we concern ourselves with the squabble between Rock Island and the Nickel Plate, on the one hand, and other carriers applicants here, on the question of whether or not supplemental hearings should have been held upon application. I don't mean to put those off lighter, but our concern is with public convenience and necessity.

Now, counsel that have preceded me have treated convenience and necessity to some extent, but I think I should [fol. 7168] point out the kind and scope of the traffic that our terminal operators handled in 1956 and 1957, at the time of the hearing.

I might point out first that in convenience and necessity cases the Commission usually adopts the test in which the question present is whether the new operation or services are to serve and will serve a useful public purpose, responsive to a public demand or need. They must also concern themselves with whether or not the proposed service could be served, whether the proposed plan or proposed situation could be best served by the existing carrier, or whether it could be best served by those carriers who are applicants.

Also it has to concern itself, of course, with whether or not the proposed service, if authorized, would endanger or impair the ability of the existing carrier. The Rock Island already has made that point.

We think, as users of the various services at the terminal at Lake Calumet Harbor, that to properly develop that [fol. 7169] area, for it to have its natural growth, and the growth which is inevitable, it seems to me, to us, with the coming of the Seaway and widening of the Calumet-Sag Channel there has to be a greater than simply one single carrier service, which the Rock Island has; and we rely on our experience at other industries in other locations for that proposition.

Mr. O'Brien already has told you of the experience of Mr. William W. Huggett of the North Pier Terminal. I am not certain whether it is the world's largest, but it is the largest in the United States. In any event, in that experience his company was located on a single line of railroad. The service faltered, the company could no longer compete. As soon as another company was accorded two line service they had to go out of business.

I might refer your Honors to the document No. 1 handed you by Mr. O'Brien and bring out that North Pier Terminal operates transit shed No. 1 at the Harbor. It also

shares in the warehousing operations at the back up warehouse immediately behind that transit shed. That is in [fol. 7170] the yellow area at the south end of the lake. Calumet Harbor Terminals conducts operations at transit shed No. 3. Also it operates in the eastern portion of the back-up warehouse. Seaway Stevedoring Company has marine terminal operations at transit shed No. 2.

What type of business do these industries conduct? They have a good portion of the export and import traffic moving between ship and rail, but they also have a very substantial quantity of the business which moves between ship and rail; that is, lake steamers, between barge lines and rails, between truck and rail, and between the rail lines themselves.

On this latter proposition an example would be rail freight coming from the east would be stopped for storage and transit at the warehouse and subsequently moved out again by rail to some western destination.

These companies also have a very large volume of business in truck water transit. We are not concerned with that; but just to illustrate and point out their business is [fol. 7171] not entirely concerned with rails.

They are the agents for hundreds of shippers and the receiving of freight from various points throughout the country on both domestic and foreign traffic. They are also agents for a number of transportation companies which service the Port. So they have a broad and diversified service which they offer to the transportation public, and that public is engaged in shipping and receiving and transporting freight or general cargo of almost any conceivable commodity you can think of, and it moves to and from the Calumet Harbor.

Then, these were the circumstances in 1957 at the time of the hearing, but as I said earlier, with the impending completion of the St. Lawrence Seaway, the widening of the Calumet-Sag Channel, and with the proposed development of the Harbor, by the Port District, the combined influence indeed will be phenomenal. Mr. Huggett says—

Judge Kalbfleisch: How is this demonstrated in the face of the claim that it was expected to be 76,500, and you are [fol. 7172] down to 13,000 cars. How do you explain that?

Mr. Myers: I say this in all seriousness, it is due to the fact that we have single line service at the Port. I say that in all seriousness and with careful thought. There are other factors, certainly. Some limiting factors might be the tolls on the Seaway; there might be a question of the car supply at the origins, whether or not the railroad going from those particular origins would want the cars to go to the eastern seaboard; there might be any number of things that could and do affect the volume of traffic.

Judge Kalbfleisch: How would the bringing in, or why would the bringing in of these six applicants improve the outlook as to these four other things you mentioned, other than the fact they only had, as you said, one of the reasons was you only had one line service?

Mr. Myers: Yes, we had one railroad. Now, if we had a multitude of railroads, if we had all this service available where we would connect and have service to the thirty-[fol. 7173] one trunk lines that service Chicago, we would have a great number of shippers and receivers as far west as California in direct line service that we don't have now. To the middle western states and the southern states the Illinois Central serves fourteen states from Lake Michigan south to the Gulf.

Judge Kalbfleisch: Well, I mean, you have to have the business first, I mean the fact they have all that much railroad doesn't necessarily—what are they going to bring in that they wouldn't bring in now? Can't they pay switching fees, and so forth, to the Rock Island?

Mr. Myers: It is not quite that simple, sir. An illustration would be if a shipper located in the east, perhaps, maybe Akron, would want to move rubber, crude rubber, which he will move into another facility in Ohio for processing and then subsequently move it into Chicago for storage and movement beyond; yet on the Rock Island that kind of service is not available at the moment. Those services,

[fol. 7174] the transit services, are many times local to the particular railroad involved. If the service is not available that shipper is going to use some other Port, if he is looking for a port, or find himself some other way to get the merchandise there.

We have not enjoyed traffic we anticipated from the switching. Some of the switching rates are too high, just high enough to divert it to trucks. That is another point I started to respond to. It was that much of this traffic is being diverted to trucks that would otherwise—

Judge Connell: These maps show no roads. Are these facilities all available to trucks that you are talking about?

Mr. Myers: Yes, I think you will find on one of these a truck concourse here (indicating). The Calumet Expressway is right adjacent to the Harbor.

Judge Connell: How do you get your oil out there on the opposite side of the water?

Mr. Myers: I don't know. That is not one of my clients. [fol. 7175] I am not familiar. I couldn't say. I am not familiar with it.

Judge Connell: Do your ships come in under their own power or use tugs?

Mr. Myers: I understand they come in under their own power.

Judge Connell: Do they use tugs on the turnaround?

Mr. Myers: I don't know.

Judge Connell: How deep is that channel?

Mr. Myers: Twenty-seven—no, twenty-one.

Judge Connell: What is the percentage of your docks which are in use?

Mr. Myers: All the docks are in use. As to percentage of use, I couldn't say. You mean as to full capacity?

Judge Connell: Yes.

Mr. Myers: I don't know.

Judge Connell: Thank you.

Mr. Myers: Now, at the time of the hearing, in fact prior to the hearing, prior to the filing of the applications

Mr. O'Brien pointed out, and we confirm, the service of [fol. 7176] the Rock Island indeed did leave something to be desired. When the applications were filed for trackage rights and for the extension of the line, Rock Island did, in fact, improve its service; so we could not honestly say at the time of the hearing that their service as such, that is, as to car supply and switching service, was inadequate.

But we feel that at a port like Lake Calumet Harbor adequacy of service amounts to something much greater than simply mere switching and car supply requirements, and I think this bears on what your Honor asked me earlier, are there any benefits in other than single line service? You have the advantages of access to a greater and more diversified car supply. Frequently there is an improvement in new cars. If there are more carriers that means more chance for those new cars. There is a shorter time in transit. That is an advantage. There is competition in rates. That is most certainly an advantage, in fact, that frequently determines whether traffic will go to one [fol. 7177] port as against another. There is access to transit privilege, not always available on other lines of a single railroad. There is access to alternate service in case of a strike or picketing on the only line service on the port.

Now, that is an important matter, and it is not always that a labor disturbance or strike affects all railroads at one time. There was testimony by a grain shipper from Danville when they had difficulty when the Wabash had a labor dispute. They had to practically close down the plant, and the only way they could get traffic on was by loading in a truck and taking it across town and putting it on another railroad there. That is obviously expensive and time consuming and results in the loss of business.

If the Rock Island were to be struck at a place as active as the Lake Calumet Harbor we would indeed be in deep trouble.

Mr. Dwinell has correctly stated that the Rock Island was a pioneer in establishing service at Lake Calumet. We

[fol. 7178] don't deny it, and we think its efforts have been helpful in the developing of the Port, in some measure at least, but we don't think that gives them a legal right to insist that no other carrier can come in. We think we are entitled to, and should have, the benefit of all those items that I mentioned in connection with a multiple line service.

I am trying to hasten over some of these things. As I indicated the Illinois Central serves 14 states from Lake Michigan down to the Gulf. The Rock Island serves an equal number of states. Those states are to the midwest and southwest. But in addition to the Illinois Central the Pennsylvania serves 13 eastern states, and the New York Central has service to the same general area with key cities in Illinois, Indiana, Ohio, and Michigan, on which we would draw for additional rail traffic and the Lake Calumet Harbor. Of course the two Belt lines that are applicants here connect with all 31 truck lines.

Mr. Burk has already pointed out to you the feeling of the ship operators that come into Chicago, and more par-
[fol. 7179] ticularly into Lake Calumet Harbor, as to their need for adequate car supply to assure fast turn-arounds.

Judge Connell: They are largely foreign ships?

Mr. Myers: Yes, sir.

Judge Connell: What is the percentage of foreign as to domestic?

Mr. Myers: I do not have the breakdown. I think they were principally foreign ships.

Judge Connell: You seem to be worried if the railroads were struck. What if there was a strike on the part of the stevedores?

Mr. Myers: That would not be as serious at the present time. We have very little domestic traffic, as I indicated, between barge and rail, between truck and rail.

Judge Connell: What does a barge bring in there?

Mr. Myers: Barges might bring in bulk commodities, sulphur, some iron and steel perhaps.

There is other evidence in the record, evidence by grain
[fol. 7180] companies as to the need for service. There are

two elevators located at Lake Calumet Harbor to support the applicants; but we think the Commission had adequate evidence, has substantial evidence to support its findings and that their order should be upheld.

I have only one other comment, and that is on the Rock Island's efforts to get before this Court and before the Commission the statistics on what they described as actual carloadings in the intervening years. I think the years were 1958 to 1962. We feel that the Commission properly rejected that information. It was outside the record. The record has to be closed at some time, and the ICC action was proper; but if, as Mr. Dwinell says, that once the other side puts in evidence outside of the record, you are privileged to do so, and I would say that sword cuts both ways. I have some comments that I would like to have made on some of the existing service at Calumet Harbor, but I don't think the Court wants to hear that.

[fol. 7181] Judge Connell: And you would be using their time.

Mr. Myers: That is all I have. Thank you.

Rebuttal Argument of Mr. Broker

Mr. Broker: May it please the Court, I will answer the various points made by the Defendants and applicants and at the same time answer the two questions, the various questions proposed by the Court initially.

Now, I must go through these things point by point. I hope that it is clarified by the documents that were handed to the Court a little while ago as to the contents of the various documents, so that if you have any questions about how was the lease changed or the joint facility, the statistics of it through the case. I think this is pretty clear in that document, but I would be glad to answer any questions I could.

Judge Edwards: Before your conclusion, do answer the question as to what the material changes are which affect the rights of your client.

Mr. Broker: All right. I will take that up now, your [fol. 7182] Honor. The problem in this case is that we went into a hearing without notice of the essential matters. Now, it said we were not surprised. There was no application filed, as you know, for the operation within the Port District.

Now, if it was necessary, if that was a substantial feature, or it was not substantial rather, the Commission would not have required them to file an application.

Did we have notice? Was this a well thought out plan, as was said earlier? Let me read some of the testimony. Mr. Dwinell was asking Mr. Cohen, General Manager of the Regional Port District as follows:

"Q. What is the plan of operation of these applicant railroads—"

Judge Kalbfleisch: What are you reading from?

Mr. Broker: From the transcript, Pages 127 to 128. The thing I am actually reading from is the appendix A of Nickel Plate's petition for reconsideration of the Port and order of September 19, 1960, dated November 3, 1960. I am quoting the testimony as reproduced in this document. [fol. 7183] Mr. Dwinell asked Mr. Cohen:

"Q. What is the plan of the operation of the applicant railroads? Where are they going to go? How are they going to service your port?"

We didn't know up to that time. Answer by Mr. Cohen:

"A. As I understand it, if they are able to come in the Rock Island could come in, and everybody else, and some certain railroad, whether the Rock Island, the Nickel Plate, or ICC, whatever, this will be chosen to perform switching services on some sort of a prorated basis. I don't know the exact details of the plan. I am not sufficiently conversant with these operating things, but in principle this is the understanding I have."

This is the kind of notice we were getting at the hearing of this document.

The President of the Illinois Central, Mr. O'Brien's client, was on the stand. I am trying to find out information.

"Q. Mr. Johnston, do you have any agreement with the Chicago Regional Port District?

"A. A signed agreement?

[fol. 7184] "Q. Yes.

"A. Not that I know of.

"Q. Do you have any agreement with any of the applicants other than those attached to the application?

"A. You mean agreements covering other operations or covering operations within the Port?

"Q. Operations within the Port and involving access to the Port.

"A. Not that I can recall.

"Q. Has this joint facility agreement that was referred to yesterday been executed?

"A. I can't answer that question either. I am not up to date."

That is the kind of notice we had.

Judge Edwards: Did you receive notice of H-29 and H-64?

Mr. Broker: At the hearing, yes, sir.

Judge Edwards: Not prior to the hearing?

Mr. Broker: No, sir. We never heard from them. We didn't know how they were going to operate. For all we [fol. 7185] knew each one would run each of its engines all over the Port individually. There was no suggestion in any document how they were going to operate within the Port until we worked it out of them at the hearing.

Judge Edwards: How long did the hearing last?

Mr. Broker: Roughly two weeks.

Judge Edwards: When were H-64 and H-29 introduced in the course of that time?

Mr. Broker: Well, this is the statement I made at the third day of the hearing, my statement to the examiner. At the beginning of this hearing I requested that—particularly the Nickel Plate be given an opportunity to present their case at a later hearing.

Now "yesterday," this was the second day, we were given an H-29, a memorandum of understanding among the various applicants, and the Rules in connection with 1-18, application Rule 26 states: "Parties must give the facts concerning any agreement, tentative or otherwise, with [fol. 7186] existing carriers," and so forth. So that was introduced on the second day.

The lease was introduced later in the hearing when they were actually offered to evidence. I objected. There was a period, roughly of two weeks or ten days here, but the important thing is that the Commission's rulings under Sections 1-19 required a disclosure in the application and the reason for the questions in there, prior to the hearing of this document, and so the parties could be prepared, and they never complied. So we went into the hearing without notice, and Section 1-19 is very strict. It say, "No certificate of public convenience and necessity shall be issued unless the Commission acts in accordance with prescribed rules."

The prescribed rules was to file the document, and we went into the hearing and we didn't have—

Judge Kalbfleisch: It occurred to me in glancing through this, in preparation for this hearing, it occurs to me that at that time, or at the close you did object; and weren't you offered a continuance?

[fol. 7187] Mr. Broker: No continuance. No, sir, I objected, but I was not offered a continuance. I asked for one and couldn't get it. I will ask my opponents.

Mr. O'Brien: I don't remember your asking.

Judge Kalbfleisch: I thought you objected. Where did I read that? I thought possibly—

Mr. Broker: I didn't get it.

Judge Kalbfleisch: My question was whether you could say actually you were prejudiced by having to try the matter at the hearing, that is, to the entry into the Port Authority?

Mr. Broker: We were prejudiced in two ways. We were prejudiced at the hearing because we didn't have the notice

that the Commission's rules said we should have, and we were prejudiced later in the hearing because they changed the lease. As a matter of fact, I hear talk here about the document that was executed as being a lease. It is not a lease. It is an agreement for non-exclusive use, and our op-
[fol. 7188] ponents refer to it as a lease. It is not a lease, so we were prejudiced at the hearing because we didn't have a notice of the proposed lease at that time, and we were prejudiced later in the case because they changed the agreement, and we never had a chance to ask them any questions.

I don't think there has ever been a case like that. I would have to say that in all earnestness. I am a great respecter of the ICC, and I practiced before them twenty-three years, and I have done everything I can to maintain the statute of the Commission, but I have never seen a case like this in my life. All we are asking for is fairness, and if we get fairness we have no complaint.

Judge Edwards: Mr. Broker, if we remand this case, to the Interstate Commerce Commission for hearing on the Port District Agreements only, what would be the fact issues which would then be heard?

Mr. Broker: I assume when you state the Port District agreements you mean the agreement for use and occupancy, and also the joint facility agreement, as to which [fol. 7189] the Port District has the authority to approve it or change it at will.

The testimony would be this: first of all, public convenience and necessity under Section 1-18. It would be incumbent upon them to come in and prove that, in the light of existing circumstances, for this additional service.

Judge Edwards: What you are suggesting is the whole case should then be reopened, either to a remand—

Mr. Broker: Yes, sir, of necessity it must be, because this is not a wish on my part to reopen the whole case.

Judge Edwards: Assume for just one moment that we have reviewed this record, and we have found there is substantial evidence on the basis of which to approve the Com-

mission's basic findings as to this plan. Is there then in your client's position a material interest in a remand for hearing on the Port District agreements only?

Mr. Broker: Yes, sir.

Judge Edwards: What would that interest be, and what would the issues be?

[fol. 7190] Mr. Broker: First, I would have to say, if the applicants come in, there was a restriction to the southwest corner of the Lake. What they indicated generally was they were going to run all over the place. If they are able to come into the Port, even at the southwest corner, as I said earlier, it is like a camel getting his nose in the tent; and if the Port ever develops they will be over on our side of the lake which we are perfectly able to serve as well as anybody you can think of, because the main yard in Chicago is at this location. We have plenty of property, over 300 acres, for the building of the yard, and it has been reserved, not just for Lake Calumet, but for the entire Nickel Plate.

So our interest as a railroad is to keep them out of any part of the Port District. Once they are in there they will be over on our side. In other words, if they make a case to justify coming in on the southwest side they can make a case to come in the southeast corner where we are.

Judge Edwards: No question the basic plan contemplates [fol. 7191] free access to all of the harbor on the part of all the applicants as approved by the Commission, is that correct?

Mr. Broker: That might be the hope of the Port District, but why should we pay $2.00 a car.

Judge Edwards: Isn't that what the Commission approved up to this point?

Mr. Broker: Well, the Commission has approved of the coming in of the six applicants that it has approved, and it done it in such a way it has attempted to preserve the right of the Rock Island to serve, and I would think they have attempted to adjust the lease so if the Nickel Plate wanted to come in we would have to go through the motions of filing an application. I am sure it would be approved,

actually on the question of the filing of the application, but we don't have to file an application. This is within our carrier territory. The Rock Island has been serving here without an application. They don't need one. There is [fol. 7192] absolutely no argument we failed to file. We haven't done anything unlawful. The Commission knows about it, and I invite our opponents to cite us, and the answer is we haven't.

Judge Edwards: Are you serving part of the Port District now?

Mr. Broker: Now we are serving the southeast corner which the Port District has leased to the Union Tank Car Company. While it is on the property owned by the Port District, technically it is not within the jurisdiction of the Port District in the same sense that the warehouses and the other industries over here are; so we, in the last year or so, built a track down to serve this industry, and the Commission presumably knows about it. We don't intend to file an application, and, as I say, if they think we are violating the law let them cite us.

Judge Edwards: You contend this was a spur track within your right to serve?

Mr. Broker: No question about it in my mind.

[fol. 7193] Judge Edwards: Well, I may have used up some of Mr. Dwinell's time.

Mr. Broker: I would like then to go to the questions, among others, that was asked, was there substantial evidence on the general plan? My answer is, "no." There was evidence to the trackage to the Port. There was evidence on the construction and operation of the connecting track. There never has been any evidence in this case on a non-exclusive use agreement; as a mater of fact, the petition for approval, as I said, is unverified and disavows public interest, which is no ordinary way to ask for a certificate of public convenience and necessity.

Now, on the other question, due process: we claim we lacked notice, and I read to you the information we were able to get. After all, if the management of the Port Dis-

trict doesn't know, how could it be held that we had adequate notice.

Due process, we contend, was violated many ways: prejudgment, confirmation of a prejudgment; acting on a stale [fol. 7194] record, acting without evidence on the use agreement.

I will conclude by thanking the Court and thanking my opponents for the patience of all of you. Thank you.

REBUTTAL ARGUMENT OF MR. DWINELL

Mr. Dwinell: May it please the Court, counsel for the applicants said that counsel for the Commission had answered out points one, two, three, so and so; and he would answer the rest. I handed to the Court two questions which I wanted counsel for the applicants to answer. He didn't do it.

I also handed to the Court the contract, the lease which was attached to the second application, and I asked counsel for the applicants to point out in that document where it provided for payment for empty cars. He didn't do it. For the simple reason—disaster, if he attempts.

Judge Edwards: Well now, Mr. Dwinell, that may be a very persuasive argument, but it doesn't mean anything unless you spell it out a little more than that. What is a "disaster"?

Mr. Dwinell: First, H-64, or whatever that was that [fol. 7195] was the lease proposed and introduced at the hearing, that was approved by the Commission, we didn't question the terms of that lease. We told the Court it never would be approved by the District and pointed out specifically reasons why the wouldn't do it.

Then they filed an application and asked to have a lease approved, which they said they had revised. The Commission said that called for payment for empty cars. We told the Commission it did not. Counsel said it did.

Then came along the final agreement, the trackage agreement, and the Commission said that that is a better lease than the one we just approved because the empty car count is eliminated in the new agreement. It had already been

eliminated in the agreement submitted by the second application. I gave it to counsel so he could show you where it called for empty cars. He didn't do it.

Now, this was one of the two reasons why the Commission [fol. 7196] approved the last trackage agreement. It was better than the one previously submitted because it eliminated the empty car count.

Counsel said that the only difference between the lease approved by the order of 1962 and the final order approving and—the trackage agreement finally approved, was in the form.

The serious thing is that they eliminated the ceiling on rents. The agreements previously submitted called for payment at 5 per cent, to be paid at the rate of $2.00 a car; but when it reached the ceiling on rents, payment stopped; and if the traffic is to be 250,000 cars a year at $2.00 a car the rent is $500,000, and right today if we were having the traffic which they say they said we would have they would be paying $150,000 a year, based on a valuation of $800,000. They are entirely different.

I really brought the question up, in addition to disposing of the two questions, to see—counsel said he was going to answer all of the other questions that we had, and the two particular things I picked out and gave copies to the Court, [fol. 7197] counsel did not answer.

I think the outstanding thing that was said by counsel for the Commission was something like this: the Commission has so much work that it is remarkable that it didn't make more mistakes than it did make, and then he admitted that they made a mistake, that the South Shore tracks wouldn't be used anymore than present. He told the Court to go someplace else in the record to find there would be co-extension and then substituted that, so the reason given by the Commission—he said they did make a mistake by adding the word "daily" when they said there would be 3500 cars to be handled in and out of the Port in one day, but he said that had nothing to do with car supply or the finding of the Commission that car supply would be increased.

I call attention to the fact that that statement was made, that it would require 3500 a day, in and out, daily, and immediately followed the sentence with "the applicants have 30 times as many cars as the Rock Island does," and cer-
[fol. 7198] tainly there is a connection between the error they made and their final finding that car supply would be increased.

And then he said they did make a mistake about Navy Pier, that Navy Pier is served by one railroad only. All right. The Commission said that all of them were served by more.

He admitted, returning to car supply, that it is the obligation of the road haul carrier to furnish the cars and not the obligation of the Rock Island, a fact that the Commission neglected to mention and apparently did not take into account.

And yet, when they get down to the end of his argument, his conclusion is, not spoken but nevertheless there, that the Commission has so much work that it makes mistakes, but those must be excused by a final conclusion, namely, the applications should be approved, must be sustained by this Court.

Now, I will grant you, they have a lot of work. I don't blame them for making mistakes. I make them, and I have
[fol. 7199] much less work than they do, particularly at my age; but we called attention of the Commission to these facts, to these mistakes, and they denied reconsideration of their order and let the mistakes stand.

Judge Edwards: Well, on this car supply, do you say here—in your explanation for the Rock Island not being in a position to supply the cars, how that would not be a handicap to the entire port operation if you alone, or you and the Nickel Plate had this?

Mr. Dwinell: Yes, sir, I did. There is not substance to it in my opinion. At the present time if a shipper there has a shipment he wants to make, say on the Illinois Central Railroad, he calls the Illinois Central Railroad and he says, "I want a car." They give it to the Rock Island, and we set it; or I can say to the Rock Island, "I need a car. I

am going to have a road haul movement." We notify the Illinois Central.

Now what would happen after all of this is done? They would notify the Illinois they wanted a car, Illinois Cen-
[fol. 7200] tral would supply the car to the joint switch engine, and the joint switch engine would place it at the industry. There is absolutely no difference.

Judge Edwards: Were there complaints to your company, Rock Island, over these past years that your services were not adequate, and did you put on new engines, and so forth, as they claim?

Mr. Dwinell: Yes, sir, there have been.

Judge Kalbfleisch: I don't know necessarily where it fits into this issue, but I am curious—

Mr. Dwinell: On page 26 and 27 we quote, of our reply, we quote to the Commission cases in which they talk about the fact a shipper always wants more service.

On Page 2 and 3 of our brief, they should have quoted the General Manager of the Port District, who said that the operation has gone along in pretty decent fashion for a new operation; and the best at that time counsel for the applicants thought they could do, when they presented their
[fol. 7201] requested findings of fact, was to say, not that Rock Island service has been poor, they said, "While the record contains some question as to the adequacy of rail service to date."

That is very different from a bland assertion that Rock Island service has been poor.

But I think the Commission really puts its finger on it when the Commission, in reply to our statement that we would lose business, said that the Rock Island service record, made since the inception of the operations of the harbor, and has been maintained to the present time, was a shield against our future loss of business.

The Commission properly disposed of the few little complaints that have been made. I don't suppose there is a day goes by that complaints aren't filed in the finest department store of the City of Cleveland.

Judge Edwards: The Courts get a few too.

Mr. Dwinell: I understand. Now, one of the items to which there was no reply made, in fact, was our issue as to [fol. 7202] the profitability of the operation. They gave two reasons why they said it was profitable, and neither of those two reasons, which are set forth in the brief, were adequate or should be considered as adequate by this Court.

One of them was if cross-town switching rates are inadequate in order to make the expense the board should raise the rates. But when they raise the rates on cross-town switching at the Port they are going to raise every cross-town switching rate in the City of Chicago. They are fixed by tariff, and they have to be uniform.

Now, just to characterize the general arguments which have been put out by the applicants, I would like to refer to a thing which doesn't amount to anything, really, but it is so typical. This is the third time in the history of this proceeding that counsel has said that the Rock Island never recognized the rights of the Nickel Plate on the east side of the lake until after the examiner had made his report, at which time we decided we would rather share the territory [fol. 7203] with one than with all of them; and three times we have answered it. Now I have to answer it again. I give the same answer which I have given heretofore: On Page 48 of our reply brief, in a letter written by Mr. Farrington, then President of the Rock Island, to the General Manager of the Port District, dated 1955, two years before the hearing, four years before the report of the examiner, and he says:

"The Nickel Plate railroad have trackage pretty well surrounding the north and east side of the District. After careful consideration, we are prepared to say to the Port District, that as the Port is developed the Rock Island will provide the necessary trackage for that portion of the District accessible to their line."

We always recognized it. When counsel has to go to the extent of saying for the third time, and when the same answer is that we denied their rights, he is running out of arguments.

Now, counsel for the applicants and counsel for the Com-
[fol. 7204] mission somewhat differ as to why they did not apply for authority within the Port. Counsel for the applicants said they really were asking for it, and so forth. Counsel for the Commission said the reason was that the Rock Island was operating in there without authority from the Commission, and why should they ask for authority.

Well, of course, the Pullman Railroad has served the Port territory all around since 1880. Section 1-18 of the Interstate Commerce Commission Act was adopted in the early 1920's or 1921, and it recognized all rights of the railroads existing at that time.

The Rock Island doesn't have to ask for authority to do that which it has done for almost 90 years, and at the time of the hearing, almost 80 years.

Now, we have always recognized that if the applicants go in there would be some cross-town switching rates which would be reduced. We have recognized that and admitted it, but they still bring it up, in spite of the fact that what
[fol. 7205] the shipper would pay for a reduction, slight reduction in their cross-town switching rates, would be the purchase of an impossible operating condition which they do not defend.

Now, one of these questions which counsel for the applicants said he would answer, he was going to answer all the rest, was that the condition was inoperable, couldn't be made to work, that they would have to go outside and get other yards and those—and that would have to be done by an application still not filed with the Commission; and yet the Commission has approved an order which can only be taken—put into operation by the approval of another application yet to be filed, and when that is filed, there will be nothing for the Commission to do but to approve it, because it will be an impossible situation, a situation which will have to be fixed up in some way.

I will repeat again a statement which we made in our reply brief in reply to a statement made by applicants' counsel. He said that the General Manager conditioned

his approval as to the future of the traffic upon the condi-
[fol. 7206] tion that all the railroads would be in.

We said then, we had read the record and found no such condition. We put it in our reply brief. Counsel repeated the statement, and all I can say is we have read the record and there was no such condition imposed. Certainly counsel are going too far when they attribute the failure of the development of the Port to the fact that the Rock Island alone is serving one side of the lake, in view of the many, many factors which influence traffic generally.

I would say that my general observation, which I made at the opening of my opening statement, still holds true, the shocking refusal of the applicants and counsel of the Commission to meet the issues and defend the findings of the Commission on the merits. That statement still stands. I am sorry they did not attempt to answer those on the merits, because I think it would have been helpful if the Court could have their views as well as ours as to why the findings of the Commission do not support it; but certainly
[fol. 7207] it is no excuse for the Commission making a mistake that it has a lot of work to do, and its remark that they make so few mistakes but that its conclusion should be supported by this Court. Thank you.

Judge Edwards: I think gentlemen, this concludes the allotted time for argument.

The Clerk: It does.

Judge Connell: We will adjourn Court until 10:00 o'clock tomorrow morning.

(Thereupon Court was adjourned.)

Reporter's Certificate to foregoing paper (omitted in printing).

[fol. 7208]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

Memorandum on Complaint Seeking Injunctive Relief Under Title 28 U.S.C., Sections 1336, 2284, and 2321-2325, Inclusive.

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

OPINION—Filed April 1, 1965

Before: Edwards, Circuit Judge, Connell, Chief District Judge, and Kalbfleisch, District Judge.

By order of November 5, 1964, the motion of Thomas O. Broker, Counsel for The New York, Chicago and St. Louis Railroad Company, to change the designation of the plaintiff to Norfolk and Western Railway Company was granted.

This litigation arises out of the national expectation that the completion of the St. Lawrence Seaway will bring a great increase in ocean-going freight to Great Lakes ports in the heartland of the continent. Chicago, the largest city on the Great Lakes, created the Chicago Regional Port District to build a new harbor to serve this traffic. The Port District prepared docks for the ships to load and unload and trackage for railroad freight cars to serve the docks. Two railroads were closest at hand; six others sought Interstate Commerce Commission permission to

[File endorsement omitted]

build trackage to connect with the Port District. This legal battle has resulted.

[fol. 7209] These complaints were filed by two railroads to seek an injunction under Title 28, U.S.C., Sections 1336, 2284, and 2321-2325, inclusive, against certain orders of the Interstate Commerce Commission which authorized six other operating railroads to extend their tracks so as to offer direct services to the newly organized Chicago Regional Port District at Lake Calumet near Chicago, Illinois.

One of the two railroads, The New York, Chicago and St. Louis (henceforth the Nickel Plate) has a line so constructed as to parallel and be prepared to serve the east side of Lake Calumet. The other complainant, the Chicago, Rock Island and Pacific Railroad Company and the Pullman Railroad Company (henceforth Rock Island) has trackage adjacent to the west side of Lake Calumet and has been providing service for such port facilities as previously existed at Lake Calumet for many years.

The six operating railroads (whose "invasion" of the Lake Calumet area is resisted by Nickel Plate and Rock Island) initiated the original proceeding before the Interstate Commerce Commission by a series of applications filed, starting in 1956. These applications sought I.C.C. approval of the construction of the necessary trackage and trackage right agreements to interconnect various of the six railroads to each other and ultimately to the Chicago Port District tracks at Lake Calumet.[1] Subsequent sup-

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plemental applications and amendments sought approval likewise of an agreement between the six railroads and the Chicago Port District for operations within the Port District.

[fol. 7210] Lengthy hearings were held before the I.C.C. Hearing Examiner in 1957 at which Rock Island and Nickel Plate intervened on leave granted and objected.

[fol. 7211] Estimates of tonnage anticipated to be handled through the Port subsequent to the opening of the St. Lawrence Seaway made by various witnesses for the petitioners before the Hearing Examiner ran from 30,000,000 tons per year to 58,000,000 tons per year, with grain and coal believed likely to constitute the bulk of this tonnage.

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ington at an estimated cost of $604,094. Each applicant is to finance its proposed construction from current funds available in their respective treasuries. The track will lead out from the westbound main line of the Kensington & Eastern at a point a short distance east of Doty Avenue and then extend east and north to a connection with the proposed track of Pennsylvania on land owned by the Pennsylvania. A portion of the Pennsylvania construction would be on property leased from the Chicago Regional Port District, hereinafter referred to as the Port District. The connection between the Illinois Central and the Pennsylvania segments would be made at about 130th Street, and the Pennsylvania track, in turn, would connect with the track owned by the Port District.

"In the same application, the Illinois Central, the Pennsylvania, and the Chicago South Shore and South Bend Railroad (South Shore) seek authority under section 5(2) of the act for the acquisition of trackage rights over the line to be constructed and certain existing tracks over which it is necessary to operate in order to reach the Lake Calumet Harbor Port, hereinafter sometimes called the harbor or port. The railroad properties of the Kensington & Eastern are leased to and are operated by the South Shore. A crossover would be installed between the eastbound and westbound tracks of the Kensington & Eastern, immediately west of the connection with the track leading to the port, to enable trains coming to the harbor to cross from the eastbound to the westbound track of the Kensington & Eastern to enter the track leading to the port.

"By application filed April 25, 1957, in Finance Docket No. 19742, The Belt Railway Company of Chicago (Belt Railway or

Extensive testimony was also taken from representatives of shipping and importing firms and concerns which had prospective economic relationships with the development of the proposed Port District.

We are confronted with two basic problems: (1) whether there is substantial evidence to support the decision of the Interstate Commerce Commission; and (2) the denial to the plaintiffs of due process of law.

The evidence submitted at the hearing before the I.C.C. Hearing Examiner by interveners in that proceeding who are plaintiffs in this one, bore principally upon three points: First, that the prospects of the port were not as rosy as the estimates of its proponents who testified before the Commission would have liked for the Commission to believe; second, that the two intervening railroads, plaintiffs herein, either were serving or were available to serve the port and the general area surrounding it; third, that the railroad service offered by them had been entirely satisfactory and still was. These latter two factual contentions on the part of the intervening railroads were largely undisputed. As to these the dispute lies not over the facts but over the legal conclusions which the opposite parties would seek to draw therefrom.

Chicago Belt) requests authority under section 5(2) of the act to acquire trackage rights over the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania from a point on its line at or near 95th Street to a point on the railroad tracks of the Port District on the west side of Lake Calumet Harbor, near 130th Street.

"By application filed September 9, 1957, in Finance Docket No. 19921, The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company applied for authority under section 5(2) of the act to acquire trackage rights on behalf of the New York Central and Indiana Harbor Belt over the lines of railroad owned or operated by the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania leading to Lake Calumet Harbor Port." *Illinois Central Railroad, et al. Construction and Trackage Rights,* 307 I.C.C. 493, 494-495 (1959) (Footnotes omitted).

A subsidiary problem arose, however, during the course of the hearing before the Hearing Examiner and has continued down into the debate before the Interstate Commerce Commission and the presentation of issues to this court. This issue pertains to railroad operations within the Port District itself. The record shows that the Port District [fol. 7212] had built railroad trackage within its boundaries to serve the various docks and elevators and other port installations which the port was calculated to provide for. The basic plan for the port contemplated that all railroad operations would move over this Port District trackage. Obviously, therefore, some agreement would have to be provided among the parties if there was to be multiple railroad use as to charges to each and as to the plan of operation for the switching of cars in and out of the Port District.

Nonetheless, petitioners' applications as originally filed and as amended up to the point of the hearing before the Hearing Examiner did not request certificates of convenience and necessity for operation within the boundaries of the Port District. This was explained by petitioners' contention that no such certificates were legally required. Further, they claimed and showed that Rock Island was operating within the Port District without such a certificate. The Interstate Commerce Commission ruled otherwise.

Petitioners did, however, present an unexecuted proposed agreement designed to show a general plan of operation. This was introduced at the hearing before the Examiner and petitioners' witnesses were cross-examined by interveners in relation to it.

With this factual background before him, the Hearing Examiner entered lengthy findings of fact and recommended issuance of the certificates of convenience and necessity which the six railroads had applied for.

Extensive objections having been filed by interveners, the Interstate Commerce Commission heard oral arguments in relation to the objections and handed down a formal opinion containing findings of fact which largely duplicated those of the Hearing Examiner.

Among the important findings for which we find substantial support in this record are the following:

[fol. 7213] "Lake Calumet Port is the major deep-water port facility of the port of Chicago. It is in the heart of the Chicago railroad switching district, and is contiguous to major arterial highways. Port District facilities and industries have unparalleled access to barge, rail, lake steamer, and motor transportation, and in the immediate future there will be complete access to ocean transportation.

"The port of Chicago has been and will continue to be the major Great Lakes general cargo port insofar as export and import shipments are concerned. Also, beginning with the 1959 shipping season, that port will become a dominant export gateway for grain moving both direct to ports abroad and in some instances to Montreal for forwarding abroad.

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"The Chicago metropolitan area embraces 3,617 square miles, and includes 5 counties in Illinois and 1 in Indiana. In addition to the city itself, the area contains approximately 180 suburban or satellite communities with a total of 14,500 manufacturing establishments employing some 2,800,000 people. The present population of the area is 6,250,000, which is expected to increase to approximately 7,900,000 persons by 1980.

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"The total waterborne traffic from and to the port of Chicago for the year 1955 was 71,490,510 tons, including overseas and Canadian export and import traffic as well as waterborne domestic traffic moving on the Great Lakes and on the Illinois waterways.

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"When the St. Lawrence Seaway, with locks 800 feet long, is opened for the 1959 navigation season, and a

draft of 27 feet is made available all the way from Montreal into the principal Great Lakes ports, there will be an important change in the size and capacity of the vessels engaged in Great Lakes overseas cargo transportation.

"Whereas under the conditions described the ships could not exceed 258 feet, the expectations were that beginning April 1959 the carriers using the enlarged St. Lawrence Seaway will be able to operate vessels about 400 to 450 feet in length. Against the present maximum cargo capacity of 180,000 cubic feet, the larger ships will have space for dry cargo totaling 350,000 cubic feet. In addition, they will have deep tanks ranging to about 15,000 cubic feet and space for 30,000 to 35,000 cubic feet of refrigerated cargo.

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[fol. 7214] "When the seaway is in operation, it will no longer be a question of vessel supply. The world merchant marine presently has slightly over 6,000 vessels that can navigate the enlarged St. Lawrence Seaway. These vessels total more than 25 million deadweight tons. If only 5 per cent of these ships (approximately 300 vessels) came into the Great Lakes, making 2 to 3 trips a year, there would be 600 to 900 vessels coming into the port of Chicago each season. An efficient, economical interchange of cargo between the land carriers and the watercarriers for such a volume of shipping will necessitate a substantially broadened railroad service into and out of the Lake Calumet port.

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"Good, efficient, and prompt service is always important in general business, but in the field of international commerce it is mandatory.

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"*Applicants' plan of operation.*—Witnesses on behalf of the applicants emphasize the fact that a large

port handling oceangoing traffic cannot efficiently operate unless adequate supporting rail facilities are available. The combined yard capacity of the applicants is 61,601 cars, or more than 12 times that presently available to serve the port through the Rock Island.

• • •

"The record shows that, if the applications are granted, the movements over the applicants' proposed route into the port will be more direct and will not involve occupation of the South Shore tracks for a longer period of time than at present. Direct delivery by the applicants entails less handling and, being in control of the entire movement to and from the port, applicants would be in position to expedite the shipments as the occasions demand. The proposed operations also would be less expensive because of the elimination of the switching charges now absorbed on line-haul traffic.

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"Some indication of future traffic through the port may be determined from the business generated in the immediate past. At the time of the hearing the port had been in operation for a relatively short period. Witnesses for the operators of the facilities at Lake Calumet Harbor were unanimous in forecasting material increases in the tonnages for the future. The present facilities at the lake are not expected to be utilized to capacity for several years, and large additions are planned for early construction. It is imperative, therefore, that at the very beginning of this new era of development a plan and system for handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion."

[fol. 7215] It should be noted that although this last finding was preceded by a recital of the position of the appli-

cants and that of the interveners pertaining to estimates of future port traffic, these estimates were not adopted by the Interstate Commerce Commission except as stated above.

As to the subsidiary issue pertaining to the operational plan within the Port District, the I.C.C. report of October 5, 1959, (307 I.C.C. 493) may be read as a finding of fact that such a plan was essential, but it also specifically held that supplemental applications must be filed showing the details of such an operational plan for specific certification by the Commission. Such applications were filed and ultimately, after an executed operational agreement between the six railroads and the Port District had been filed, supplemental orders were issued granting the required certificates of convenience and necessity.

As to this phase of the case, although interveners requested it, no additional hearing was ever held.

On the basis of the findings indicated above, the Commission entered original and supplemental orders[2] granting the certificates of convenience and necessity sought by the six railroads for operations up to and within the Port District.

We choose to deal with the issues in this case under separate categories: First, those pertaining to the construction of trackage and leasing agreements for operation over trackage *up to the property line of the Port District;* and secondly, those issues bearing on operations *within the Port District itself.*

[fol. 7216] First Category

Although plaintiffs in this proceeding present a great many questions, we believe as to the first category the material issues can be fairly summarized under three headings:

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[2] These supplemental orders are reported at 312 I.C.C. 277 (1960) and 317 I.C.C. 502 (1962).

First, did the intervening railroads before the Interstate Commerce Commission, the plaintiffs herein, have such rights to the rail business into and out of the Lake Calumet area by virtue of proximity and prior service to this area so as to require this court to invalidate the certificates of convenience and necessity issued to the other six railroads by the Interstate Commerce Commission?

Second, should the orders of the Interstate Commerce Commission complained of under this category be vacated because they are based upon a "stale record," i.e., was there a denial to the plaintiffs of due process of law?

Third, is there substantial evidence to support the orders of the Interstate Commerce Commission granting the six railroads certificates of convenience and necessity for the construction of trackage and trackage lease agreements up to the boundary of the Port District?

Second Category

Issues pertaining to the certificates for operation within the Port District can be summarized in one question:

Under the full record should the supplemental orders of the Interstate Commerce Commission granting certificates of convenience and necessity for the six railroads to operate within the Port District be vacated because said supplemental orders were entered without due process to the plaintiffs?

First Category

As to the first category of issues pertaining to the orders granting permission to operate up to the boundaries of the Port District, the major conclusions of the Interstate Commerce Commission are as follows:

[fol. 7217] "Consideration of the entire record herein warrants the conclusion that the applications should be approved. Such approval would result in greater

rail competition, better service, greater car supply, and lower rates for the industries on Part District property at Lake Calumet Harbor. Direct service to the port by the applicants would place them on a par with the Rock Island insofar as solicitation of originated grain traffic for export is concerned, and the applicants would retain control of their freight equipment made empty at the port, so that such equipment could be returned in fast shuttle service to country elevators without loss of time required by interchange.

"The time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there. Better service to shippers and receivers of freight through the elimination of delays, by providing single-line hauls, or more direct hauls, is clearly in the public interest. It would be a detriment and hinderance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available and anxious to serve the port. Although the port is now served by approximately 100 common-carrier trunk-lines, and there is no restriction on the number of barges and ships permitted to serve the port, the Rock Island is the only railroad presently serving the port.

"Congress, the courts, and this Commission have placed a higher value on future convenience and necessity than on the convenience and necessity that presently might exist in section 1(18) construction proceedings. If the applicants can prove, as they have herein, that the proposed construction either presently or in the reasonably near future is necessary to meet a public need, and will be reasonably profitable, we may issue a certificate authorizing the proposed construction. Transportation service which aids in the future development of a territory is in the public interest. *Interstate Commerce Commission* v. *Oregon-W.R. & Nav. Co.*, 288 U.S. 14. Considering all the circumstances

in these proceedings, particularly the expansion program now in progress at the port, and the increased amount of rail traffic to be made available at the port, we are of the opinion that the additional service of the applicants is warranted. *Gulf, M.&O. R. Co. Construction,* 271 I.C.C 541." 307 I.C.C., at 527.

We feel that this record does not offer ample support in fact and law for the conclusions of the Interstate Commerce Commission quoted above.

[fol. 7218] Title 49, U.S.C., Section 1(18) gives the Interstate Commerce Commission the right to approve extensions of rail service limited only by the requirement that there be substantial showing that "present or future public convenience and necessity" require the extension:

> *"Extension or abandonment of lines; certificates required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad." 49 U. S. C., Section 1(18).

It has long been held that provision of competition for shipper benefit was one of the considerations of public convenience and necessity available to the Interstate Commerce Commission under the terms of the act. *Chesapeake & Ohio Railway Co.* v. *United States,* 283 U.S. 35 (1931); *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (1957). See also 33 Law Week, page 2399.

Second Category

As to the issues involved in the operation of the six railroads within the Port District, a recital of additional background facts is required.

In the original applications filed by the six railroads for certificates of convenience and necessity to bring their rail service to the Port District, as we have noted, no such certificates were requested for the operations within the boundaries of the Port District itself. It was apparently the view of the six railroads that if they were able to negotiate agreements with the Port District this took care of the matter without any I.C.C. certificate. In its origi- [fol. 7219] nal report of October 5, 1959, however, the I.C.C. ruled that such certificates of convenience and necessity were necessary for operation of the railroads concerned within the Port District itself:

> "We are of the opinion that operation by the applicants into the Port District, as proposed, constitutes an extension of a line of railroad requiring our prior approval * * * ." 307 I.C.C. 493, 525.

The I.C.C. further ruled that supplementary applications must be filed seeking certificates of convenience and necessity for operations within the port, and reserved judgment on the unexecuted lease agreement which purported to show the general method of operation contemplated within the port until the filing of such supplementary applications.

The six railroads concerned thereupon complied, filing supplemental applications seeking certificates pertaining to operations within the port and the two intervening railroads then sought a hearing on these supplemental applications. A hearing on the supplemental applications was denied by the I.C.C.

Thereafter, as a result of negotiations between the six railroads and the Port District, an operating agreement was negotiated and executed which did not, however, correspond

in several important particulars, including the economic terms, with that which had been previously authorized by the I.C.C.

On the filing of this executed agreement, the I.C.C. issued another supplemental order pointing out the variances and requiring the six railroads to file supplemental applications for permission to operate in accordance with the provisions of the executed agreement and withholding approval until such supplemental applications were filed. The Commission thereupon entered its final supplemental order, dated November 26, 1962, which approved the operating agreement as previously negotiated and signed. It should be noted that *at no time during this proceeding was there any hearing on the terms of the operating agreement.* In its final order the Commission dealt with this matter in the following language:

> [fol. 7220] "In our report of September 19, 1960 [312 I.C.C. 277] we held that a hearing was not necessary for a determination of the questions at issue. We also denied a request of the Rock Island for further hearing by our order of August 23, 1962. Since the general public convenience and necessity for the applicants' operations over the Port District's tracks has been determined with only the specific terms and conditions of such operations remaining for approval, and since most of the interveners' objections to the modified agreement are actually only reiterations of their objections to the overall proposals of the applicants to serve the harbor area which have been previously discussed and disposed of in our prior reports and orders herein, we do not deem it proper to revisit upon the applicants and other parties to the proceeding the additional time and expense of a hearing upon the modified agreement." 317 I.C.C. 502, 503.

It is clear that a certificate of convenience and necessity cannot stand unless it is based on findings of fact supported by substantial evidence. 5 U.S.C., Section 1009(e).

Summary and Conclusion

It appears to us that there are two fatal flaws in the proceedings and the orders of the Interstate Commerce Commission. The first concerns the sufficiency of the evidence to support the I.C.C.'s determination of public convenience and necessity, and the second concerns the denial to the plaintiffs of due process of law.

At the time of the hearing the applicants had not requested the I.C.C.'s permission to operate within the Port District. This failure was due to their belief that such requests were not necessary. The I.C.C. ruled otherwise. As a result of that ruling, the applicants presented evidence at the hearing of a proposed agreement between applicants and the Port District. On the basis of that agreement, and the other evidence presented, the I.C.C. granted the requested authority, contingent upon the proposed plan's being executed.

However, the proposed plan was not executed. Negotiations continued between the applicants and the Port District for several years, with various proposals being considered. Eventually an agreement was reached, and it was [fol. 7221] upon the basis of this agreement that the I.C.C. finally issued the certificate of public convenience and necessity, without however having granted the parties any further hearings.

One of the provisions of the agreement that was finally consummated governed the rates to be paid by the railroads as rentals to the Port District. The final agreement called for a different formula to be applied in determining the rentals payable to the Port District by the railroads for the use of the District's property. The final agreement differed from the agreement which had been previously authorized by the I.C.C. in several important particulars, including the economic terms.

Thus we see that the I.C.C., after having said that it would issue a certificate of public convenience and necessity if the proposed plan were adopted, nevertheless

granted the certificate in spite of the fact that a different plan was adopted without further hearings.

We have concluded that there is insufficient evidence in the record to support the Commission's determination that a certificate of public convenience and necessity should be granted to the applicants to operate within the Port District. This conclusion results from our belief that it is impossible for the Commission to make a supportable determination of public convenience and necessity unless there is adequate evidence in the record as to operating costs. It cannot be disputed that one of the important elements which must be considered in determining whether a certificate of public convenience and necessity should issue is whether the operation can be profitably undertaken. We fail to see how a decision on potential profitability can be made unless there is a record which shows what the operating costs will be. A major deficiency exists because the rental provisions under the final plan differ materially from the rental provisions under the plan originally proposed.

[fol. 7222] The record shows what the rental rates will be, but does not show what effect those rates will have on the overall operating costs. This is important because the rental is dependent upon the number of cars handled. The only evidence on the effect of specific rates relates to the proposed rates which never were put into effect. Certainly, to support a grant of public convenience and necessity, a record should contain evidence as to what impact the rental charges will have upon the profitability of the venture. A hearing following the execution of the final agreement between the applicants and the Port District would have provided that evidence.

The plaintiffs, although not parties to the final agreement, will be required to operate under the terms of the agreement entered into between their adversaries and the Port District. They were not given an opportunity to present evidence or to cross-examine the contracting parties concerning the agreement. The fact that plaintiffs did have some opportunity to introduce evidence and to cross-exam-

ine in regard to the original proposed agreement does not rectify this omission. The failure to give plaintiffs timely notice before the hearing upon the final agreement was contrary to the Administrative Procedure Act and the rules which Section 1(18) of the Interstate Commerce Act states must be observed; these statutes reflect the constitutional requirements of due process.

It is our conclusion that the Commission's failure to give plaintiffs an opportunity to introduce evidence and to cross-examine witnesses in regard to the various managerial and economic aspects of the final plan, by which they were bound, constituted a denial to them of due process of law.

It is our further conclusion that the I.C.C. is required to reconsider the issue of public convenience and necessity with reference to the operations up to the boundaries of the Port District by conducting a complete rehearing. The tracks outside the Port District go only to the boundaries [fol. 7223] of the District, and the only purpose of building them will be to enable the applicants to operate within the District.

We have concluded that a rehearing is required upon all of the issues for the reason that the operation of railroad services up to the boundaries of the Port District cannot be considered apart from the railroad operation within the Port District.

The original order of the I.C.C. and the supplemental orders dated September 19, 1960, August 23, 1962, and November 26, 1962, will be vacated and the case will be remanded for the taking of further evidence upon all issues raised herein.

James C. Connell, Chief Judge, United States District Court; Gerard E. Kalbfleisch, United States District Judge.

[fol. 7224] EDWARDS, Circuit Judge, dissenting. This case was heard January 24, 1964. The following opinion was drafted (as its form clearly indicates) as a proposed opinion of the Court and served on April 10, 1964. My colleagues on this Court have responded with a quite different view. With all respect, I tender my original thoughts as a dissent. The only changes are those required to phrase the opinion in the singular.

This litigation arises out of the national expectation that the completion of the St. Lawrence Seaway will bring a great increase in ocean-going freight to Great Lakes ports in the heartland of the continent.[1] Chicago, the largest city on the Great Lakes, created the Chicago Regional Port District to build a new harbor to serve this traffic. The [fol. 7225] Port District prepared docks for the ships to load and unload and trackage for railroad freight cars to serve the docks. Two railroads were closest at hand; six others sought Interstate Commerce Commission permission to build trackage to connect with the Port District. This legal battle has resulted.

[fol. 7226] These complaints were filed by two railroads to seek an injunction under Title 28 U.S.C. §§ 1336, 2284 and 2321-2325, incl., against certain orders of the Interstate Commerce Commission which authorized six other operating railroads to extend their tracks so as to offer direct services to the newly organized Chicago Regional Port District at Lake Calumet near Chicago, Illinois.

One of the two railroads, The New York, Chicago and St. Louis (henceforth the Nickel Plate) has a line so constructed as to parallel and be prepared to serve the east side of Lake Calumet. The other complainant, the Chicago, Rock Island and Pacific Railroad Company and the Pull-

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[1] For official action in this respect, see Agreement with Canada on St. Lawrence Seaway navigation facilities, June 30, 1954, 5 U.S.T. & O.I.A. 1784, T.I.A.S. No. 3053, U.N.T.S. 210.

33 U.S.C. Chapt. 19, §§ 981-990.

Exec. Order No. 10534, June 9, 1954, F.R. 3413 as amended by Exec. Order No. 10771, June 23, 1958, 23 F.R. 4525.

man Railroad Co. (henceforth Rock Island) has trackage adjacent to the west side of Lake Calumet and has been providing service for such port facilities as previously existed at Lake Calumet for many years.

The six operating railroads (whose "invasion" of the Lake Calumet area is resisted by Nickel Plate and Rock Island) initiated the original proceeding before the Interstate Commerce Commission by a series of applications filed, starting in 1956. These applications sought I.C.C. [fol. 7227] approval of the construction of the necessary trackage and trackage right agreements to interconnect various of the six railroads to each other and ultimately to the Chicago Port District tracks at Lake Calumet.[2] Sub-

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[2] "By application filed October 22, 1956, in Finance Docket No. 19538, the Kensington and Eastern Railroad Company (a nonoperating company), the Illinois Central Railroad Company, The Philadelphia, Baltimore and Washington Railroad Company (a nonoperating company), and The Pennsylvania Railroad Company applied under section 1(18) of the act for authority to construct a line of railroad, approximately 1.431 miles, in Cook County, Ill. The initial segment of 2,900 feet, or 0.549 mile, would be constructed by the Kensington & Eastern at an estimated cost of $222,596; the next 630 feet, or 0.119 mile, would be built by the Illinois Central at an estimated cost of $35,886; and the final 4,030 feet, or 0.763 mile, would be constructed by the Pennsylvania in behalf of the Philadelphia, Baltimore & Washington at an estimated cost of $604,094. Each applicant is to finance its proposed construction from current funds available in their respective treasuries. The track will lead out from the westbound main line of the Kensington & Eastern at a point a short distance east of Doty Avenue and then extend east and north to a connection with the proposed track of Pennsylvania on land owned by the Pennsylvania. A portion of the Pennsylvania construction would be on property leased from the Chicago Regional Port District, hereinafter referred to as the Port District. The connection between the Illinois Central and the Pennsylvania segments would be made at about 130th Street, and the Pennsylvania track, in turn, would connect with the track owned by the Port District.

"In the same application, the Illinois Central, the Pennsylvania, and the Chicago South Shore and South Bend Railroad (South Shore) seek authority under section 5(2) of the act for the acquisition of trackage rights over the line to be constructed and certain existing tracks over which it is necessary to operate in order to

sequent supplemental applications and amendments sought approval likewise of an agreement between the six railroads and the Chicago Port District for operations within the Port District.

[fol. 7228] Lengthy hearings were held before the I.C.C. Hearing Examiner in 1957 at which Rock Island and Nickel Plate intervened on leave granted and objected.

[fol. 7229] The first witness at the hearings was the general manager of the Chicago Regional Port District who gave the following history of the development:

> "The development of Lake Calumet Harbor is something that has been thought about and planned for the last 37 years. The original plan for the development of Lake Calumet Harbor was drafted by Arend Van-Vlissingen in 1920. The basis of this plan was the

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reach the Lake Calumet Harbor Port, hereinafter sometimes called the harbor or port. The railroad properties of the Kensington & Eastern are leased to and are operated by the South Shore. A crossover would be installed between the eastbound and westbound tracks of the Kensington & Eastern, immediately west of the connection with the track leading to the port, to enable trains coming to the harbor to cross from the eastbound to the westbound track of the Kensington & Eastern to enter the track leading to the port.

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"By application filed September 9, 1957, in Finance Docket No. 19921, The Michigan Central Railroad Company, The New York Central Railroad Company, and the Indiana Harbor Belt Railroad Company applied for authority under section 5(2) of the act to acquire trackage rights on behalf of the New York Central and Indiana Harbor Belt over the lines of railroad owned or operated by the Illinois Central, the Kensington & Eastern, the South Shore, and the Pennsylvania leading to Lake Calumet Harbor Port." *Illinois Central Railroad, et al. Construction and Trackage Rights,* 307 I.C.C. 493, 494-495 (1959) (Footnotes omitted).

development of 2250 acres of land and water. The Regional Port District came into existence in 1951 as a result of legislation which was fostered by a sound concept that something had to be done to develop port and harbor facilities in the City of Chicago. From 1951 to 1953 the powers of the Regional Port District were limited. It wasn't until 1953 that the Illinois Legislature granted to the Port District the right to issue its own Revenue Bonds as a result of which the Port District as such could go ahead and make some definite plans for a development. I came with the Port District in the fall of 1953. Before becoming affiliated with the Chicago Regional Port District I was the Manager of Marine Traffic of very large facilities and my record speaks for itself in the promotion of this particular type of activity. The Chicago Regional Port District procured a Quit Claim Deed to the bed of Lake Calumet from the City of Chicago in the spring of 1955, and within almost 4 months thereafter the foundation for a practical plan for financing was put together.

[fol. 7230] "In 1955 the Port District again realized that the concept of the Port District Act had to be changed because it felt its best public interest would be served by having the law changed so that all of the facilities which it was empowered to create, as well as those which it would develop over a period of years, would, by law, be turned into private hands for lease and operation. To the best of our knowledge this is the only port authority or board of its type any place in the world that by law has the right to do this. It is important to understand that these facilities, while they have been created by municipal action, are not operated by this municipal corporation, that each facility in itself is a separate entity in the hands of a private operator, which, of course, puts an entirely different complexion on this development.

"On October 1, 1955, we were able to procure the proceeds from the sale of bonds and we were able to finish these facilities within the allotted time and within the amount of money that we had to spend. When we were ready to go ahead with our first stage of development we made it very plain that these facilities were being constructed to handle a complete interchange of domestic business, intrastate, interstate, as well as import and export freight, and it was because of the flexibility and the wide contact that these facilities would have that we were able to lease these facilities when we did.

"On July 1, 1957, we presented to the State of Illinois a revised plan for this development which was approved by the State of Illinois. In this plan we sought to place on one side of the lake all of the facilities that would be adaptable for commercial purposes such as grain elevators, warehouses, cold storage places, trucking terminals, transit sheds and any of the other developments that would come with a commercial setup. It was laid out in that particular fashion because we sought to expose as much of the property as we could to water contact as well as rail contact. It is impractical to conceive of a development of this nature and size without having all of the rail [fol. 7231] and truck access because no great area of this type can be created without having a fusion of all of these facilities, and the harbor which we laid out follows more or less a pattern seen in Antwerp, Hamburg, Rotterdam and places like that where over a long period of years the authorities sought to bring into certain areas all of these facilities.

"With respect to industrial setup, the area offered undeniable advantages because raw material could come in by barge or vessel and here be fabricated and processed and shipped away by rail and truck. The development itself offers a composite setup. The area which is east of Lake Calumet should, in some form or

another, be added to the harbor complexion, not particularly under the ownership or management of Chicago Regional Port District but the property development as such should be fused in with the lake so that instead of 2000 acres, such as we have now, there would be available a little better than 3000 acres of land which could be integrated into a comprehensive layout and all of the exposures of the slips on the east side have been laid out in that particular fashion so that by pipe line, conveyor, or in any other method the movement of raw materials might go from those areas in and out of the harbor."

The resolution of the Chicago Regional Port District Board of January 15, 1954, pertaining to railroad policy was read into the record by this witness:

"In pursuance of its duty, the Port District Board at its regular meeting under date of January 15, 1954, adopted the following resolution:

"'Be It Resolved That the Chicago Regional Port [fol. 7232] District reaffirm and restate its railroad policy for Lake Calumet Harbor which policy unequivocably is that the public interest as well as the interests of prospective tenants and users of the Lake Calumet Harbor will be best served by making available to them all accessible railroad service on equal basis, and under no circumstances that a monopoly or exclusive privilege shall be granted to any single railroad carriers to serve the Lake Calumet Harbor.

"'Furthermore, that it shall be the declared policy of the Chicago Regional Port District to foster and attract railroad carriers which have a primary interest in the development of the Lake Calumet Harbor as a rail-truck-barge-ship interchange harbor.'"

And the same witness recited five reasons for the Port District favoring multiple railroad line service:

"The 5 reasons which I gave the Port District Board as to why service by more than one railroad was advisable may be stated as follows:

"First, a district of this particular type if it was served by belt lines, or more railroads, would have more possibilities of 1 and 2-line hauls instead of 3-line hauls. The second reason was the possibility of a strike. If there was a strike on the railroad serving —and we only had one railroad—that all service in and out of the Port District would be stopped and we would be badly, let's say, confused and confined to troubles if this was the case. The third reason was the necessity for car supply. If more railroads were there, more railroads could be called upon to supply cars. The fourth reason was that if more railroads were in, there would be more competition, and naturally we would get better service. The fifth reason we discussed was the philosophy of a Port of our type in business through an Act of the Legislature trying to serve the public interest, that it was unfair to monopolize the [fol. 7233] service for one railroad. There was one other reason. I tried to explain to our directors if the Belt Railway Company of Chicago was serving the harbor, that more of their lines, because they were owners, could be contacted directly for, let's say, a better understanding of import and export rates and that I felt these contacts that could be had would be beneficial to the Port, and because of their over-all interest, that we might get better acceptance and quicker establishment of these rates."

Estimates of tonnage anticipated to be handled through the Port subsequent to the opening of the St. Lawrence Seaway made by various witnesses for the petitioners before the Hearing Examiner ran from 30,000,000 tons per year to 58,000,000 tons per year, with grain and coal believed likely to constitute the bulk of this tonnage.

Rock Island's witness, Mr. Marvin Pair, Professor of Economics and Transportation at Tulane University, presented the pessimistic view of the matter at this hearing. He made some detailed comments on the problems of moving deep-sea traffic through the Seaway and concluded: "I do not see how I or anyone can make an accurate estimate of the export and import traffic which will move in and out of the Port."

But this witness also said:

> "All I have said about the future of traffic was stated merely to show the impossibility of forecasting of traffic with any degree of accuracy. Notwithstanding what [fol. 7234] I have said, Lake Calumet Port, as I said before, has a promising future, because of a good plan, room for development, a territory from which to draw, and presence of bulk commodity traffic, but time alone will tell what volume of traffic will move in and out of the port, and how much of it will move by rail. Grain traffic undoubtedly will represent a substantial portion of the port's business because of the presence of large elevator storage capacity there. What portion of the total volume of this traffic will be moved by railroad to and from the port is difficult to say."

Extensive testimony was also taken from representatives of shipping and importing firms and concerns which had prospective economic relationships with the development of the proposed Port District. Typical of the testimony of the ultimate users of the Port District was this testimony from Thomas H. Coulter, representing the Chicago Association of Commerce and Industry, who stated:

> "It is the position of our association that the best interests of Chicago and the Chicago Port District would be served if more than one carrier were given access to port facilities and serve the Chicago Regional Port District."

He continued:

> "[I]n my opinion it [the increase in rail service] will benefit shippers in that large section of the midwest that uses the Port of Chicago for export and import traffic, and on other traffic interchanged between different types of carriers at Port District facilities."

When asked for reasons to substantiate this opinion the witness gave a detailed analysis of past and projected in- [fol. 7235] dustrial and agricultural growth in the Chicago area and the midwest. In addition, the witness gave figures on the number of new shipping lines which called at the Chicago port, as well as those which were expected to use the port upon completion of the Seaway. Based on this analysis the witness concluded:

> "With this additional service it is anticipated that over-seas export and import traffic will increase substantially, and that within five years the traffic moving through the Port of Chicago is estimated at one and one-half million tons, or six times its present volume.
>
> • • •
>
> "To take care of this increased traffic, we will need within the next decade all of the port facilities now being planned for the convenience of industries located within the Port District, within the Chicago metropolitan area and for all shippers and receivers of export and import traffic through the Port of Chicago. We feel that additional rail lines should be permitted to serve the Chicago Regional Port District."

The above is only a sample of the evidence included in the lengthy record of over 1500 typed pages developed before the Hearing Examiner for the I.C.C. While what I have quoted herein is principally the testimony of the petitioners, it is highly relevant to the instant case, since in this proceeding the basic question is not the wisdom or

correctness of the administrative decision of the Interstate [fol. 7236] Commerce Commission, but whether or not there was substantial evidence to uphold it.

The evidence submitted at the hearing before the I.C.C. Hearing Examiner by interveners in that proceeding who are plaintiffs in this one, bore principally upon three points: First, that the prospects of the port were not as rosy as the estimates of its proponents who testified before the Commission would have liked for the Commission to believe.

Secondly, that the two intervening railroads, plaintiffs herein, either were serving or were available to serve the port and the general area surrounding it.

Third, that the railroad service offered by them had been entirely satisfactory and still was.

These latter two factual contentions on the part of the intervening railroads were largely undisputed. As to these the dispute lies not over the facts but over the legal conclusions which the opposite parties would seek to draw therefrom.

As to the first contention pertaining to the prospects of the port, the nature of defendant's testimony in that regard has already been indicated above.

A subsidiary problem arose, however, during the course of the hearing before the Hearing Examiner and has con- [fol. 7237] tinued down into the debate before the I.C.C. and the presentation of issues to this court. This issue pertains to railroad operations within the Port District itself. The record shows that the Port District had built railroad trackage within its boundaries to serve the various docks and elevators and other port installations which the port was calculated to provide for. The basic plan for the port contemplated that all railroad operations would move over this Port District trackage. Obviously, therefore, some agreement would have to be provided among the parties if there was to be multiple railroad use as to charges to each and as to the plan of operation for the switching of cars in and out of the Port District.

Nonetheless, petitioners' applications as originally filed and as amended up to the point of the hearing before the Hearing Examiner, did not request certificates of convenience and necessity for operation within the boundaries of the Port District. This was explained by petitioners' contention that no such certificates were legally required. Further, they claimed and showed that Rock Island was operating within the Port District without such a certificate.

Petitioners did, however, present an unexecuted proposed agreement designed to show a general plan of [fol. 7238] operation. This was introduced at the hearing before the Examiner and petitioners' witnesses were cross-examined by interveners in relation to it.

With this factual background before him, the Hearing Examiner entered lengthy findings of fact and recommended issuance of the certificates of convenience and necessity which the six railroads had applied for.

Extensive objections having been filed by interveners, the Interstate Commerce Commission heard oral arguments in relation to the objections and handed down a formal opinion containing findings of fact which largely duplicated those of the Hearing Examiner.

Among the important findings for which I find substantial support in this record are the following:

> "Lake Calumet Port is the major deepwater port facility of the port of Chicago. It is in the heart of the Chicago railroad switching district, and is contiguous to major arterial highways. Port District facilities and industries have unparalleled access to barge, rail, lake steamer, and motor transportation, and in the immediate future there will be complete access to ocean transportation.
>
> "The port of Chicago has been and will continue to be the major Great Lakes general cargo port insofar as export and import shipments are concerned. Also, beginning with the 1959 shipping season, that port will [fol. 7239] become a dominant export gateway for

grain moving both direct to ports abroad and in some instances to Montreal for forwarding abroad.

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"The Chicago metropolitan area embraces 3,617 square miles, and includes 5 counties in Illinois and 1 in Indiana. In addition to the city itself, the area contains approximately 180 suburban or satellite communities with a total of 14,500 manufacturing establishments employing some 2,800,000 people. The present population of the area is 6,250,000, which is expected to increase to approximately 7,900,000 persons by 1980.

• • •

"The total waterborne traffic from and to the port of Chicago for the year 1955 was 71,490,510 tons, including overseas and Canadian export and import traffic as well as waterborne domestic traffic moving on the Great Lakes and on the Illinois waterways.

• • •

"When the St. Lawrence Seaway, with locks 800 feet long, is opened for the 1959 navigation season, and a draft of 27 feet is made available all the way from Montreal into the principal Great Lakes ports, there will be an important change in the size and capacity of the vessels engaged in Great Lakes overseas cargo transportation.

"Whereas under the conditions described the ships could not exceed 258 feet, the expectations were that beginning April 1959 the carriers using the enlarged St. Lawrence Seaway will be able to operate vessels about 400 to 450 feet in length. Against the present [fol. 7240] maximum cargo capacity of 180,000 cubic feet, the larger ships will have space for dry cargo totaling 350,000 cubic feet. In addition, they will have deep tanks ranging to about 15,000 cubic feet and space for 30,000 to 35,000 cubic feet of refrigerated cargo.

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"When the seaway is in operation, it will no longer be a question of vessel supply. The world merchant marine presently has slightly over 6,000 vessels that can navigate the enlarged St. Lawrence Seaway. These vessels total more than 25 million deadweight tons. If only 5 per cent of these ships (approximately 300 vessels) came into the Great Lakes, making 2 to 3 trips a year, there would be 600 to 900 vessels coming into the port of Chicago each season. An efficient, economical interchange of cargo between the land carriers and the water carriers for such a volume of shipping will necessitate a substantially broadened railroad service into and out of the Lake Calumet port.

• • •

"Good, efficient, and prompt service is always important in general business, but in the field of international commerce it is mandatory.

• • •

"*Applicants' plan of operation.*—Witnesses on behalf of the applicants emphasize the fact that a large port handling oceangoing traffic cannot efficiently operate unless adequate supporting rail facilities are available. The combined yard capacity of the applicants is 61,601 cars, or more than 12 times that presently available to serve the port through the Rock Island.

• • •

"The record shows that, if the applications are granted, the movements over the applicants' proposed route into the port will be more direct and will not involve occupation of the South Shore tracks for a longer [fol. 7241] period of time than at present. Direct delivery by the applicants entails less handling and, being in control of the entire movement to and from the port, applicants would be in position to expedite the shipments as the occasions demand. The proposed operations also would be less expensive because of the

elimination of the switching charges now absorbed on line-haul traffic.

• • •

"Some indication of future traffic through the port may be determined from the business generated in the immediate past. At the time of the hearing the port had been in operation for a relatively short period. Witnesses for the operators of the facilities at Lake Calumet Harbor were unanimous in forecasting material increases in the tonnages for the future. The present facilities at the lake are not expected to be utilized to capacity for several years, and large additions are planned for early construction. It is imperative, therefore, that at the very beginning of this new era of development a plan and system for handling the transportation needs of the port be established which will assure the type of service that is expected and will provide for steady progress and expansion."

It should be noted that although this last finding was preceded by a recital of the position of the applicants and that of the interveners pertaining to estimates of future port traffic, these estimates were not adopted by the I.C.C. except as stated above.

As to the subsidiary issue pertaining to the operational plan within the Port District, the I.C.C. report of October 5, 1959, (307 I.C.C. 493) may be read as a finding of fact [fol. 7242] that such a plan was essential, but it also specifically held that supplemental applications must be filed showing the details of such an operational plan for specific certification by the Commission. Such applications were filed and ultimately, after an executed operational agreement between the six railroads and the Port District had been filed, supplemental orders were issued granting the required certificates of convenience and necessity.

As to this phase of the case, although interveners requested it, no additional hearing was ever held.

On the basis of the findings indicated above, the Commission entered original and supplemental orders[3] granting the certificates of convenience and necessity sought by the six railroads for operations up to and within the Port District.

I choose to deal with the issues in this case under separate categories: first, those pertaining to the construction of trackage and leasing agreements for operation over trackage *up to the property line of the Port District.* And, secondly, those issues bearing on operations *within the Port District itself.*

[fol. 7243] First Category

Although plaintiffs in this proceeding present a great many questions, I believe as to the first category the material issues can be fairly summarized under three headings.

First, did the intervening railroads before the I.C.C., the plaintiffs herein, have vested rights to the rail business into and out of the Lake Calumet area by virtue of proximity and prior service to this area so as to require this court to invalidate the certificates of convenience and necessity issued to the other six railroads by the I.C.C.?

Second, should the orders of the I.C.C. complained of under this category be vacated because they are based upon a "stale record" in that comparing figures sought to be presented subsequently by plaintiffs herein, the actual freight moving into and out of the Lake Calumet Port District has been substantially less than the estimates presented at the I.C.C. hearing?

Third, is there substantial evidence to support the orders of the I.C.C. granting the six railroads certificates of convenience and necessity for the construction of trackage and trackage lease agreements up to the boundary of the Port District?

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[3] These supplemental orders are reported at 312 I.C.C. 277 (1960) and 317 I.C.C. 502 (1962).

[fol. 7244] Second Category

The issues can be summarized in one question:

Under the full record should the supplemental orders of the I.C.C. granting certificates of convenience and necessity for the six railroads to operate within the Port District be vacated because said supplemental orders were entered without hearing?

First Category

As to the first category of issues pertaining to the orders granting permission to operate up to the boundaries of the Port District, the major conclusions of the I.C.C. are as follows:

> "Consideration of the entire record herein warrants the conclusion that the applications should be approved. Such approval would result in greater rail competition, better service, greater car supply, and lower rates for the industries on Port District property at Lake Calumet Harbor. Direct service to the port by the applicants would place them on a par with the Rock Island insofar as solicitation of originated grain traffic for export is concerned, and the applicants would retain control of their freight equipment made empty at the port, so that such equipment could be returned in fast shuttle service to country elevators without loss of time required by interchange.
>
> "The time has come when additional rail service at the port is required for the future development of the industries now or hereafter to be located there. Better [fol. 7245] service to shippers and receivers of freight through the elimination of delays, by providing single-line hauls, or more direct hauls, is clearly in the public interest. It would be a detriment and hindrance to the full and complete development of Lake Calumet Harbor if it were limited to the service of a single trunkline railroad when so many adjacent railroads are available

and anxious to serve the port. Although the port is now served by approximately 100 common-carrier truck-lines, and there is no restriction on the number of barges and ships permitted to serve the port, the Rock Island is the only railroad presently serving the port.

"Congress, the courts, and this Commission have placed a higher value on future convenience and necessity than on the convenience and necessity that presently might exist in section 1(18) construction proceedings. If the applicants can prove, as they have herein, that the proposed construction either presently or in the reasonably near future is necessary to meet a public need, and will be reasonably profitable, we may issue a certificate authorizing the proposed construction. Transportation service which aids in the future development of a territory is in the public interest. *Interstate Commerce Commission* v. *Oregon-W.R. & Nav. Co.*, 288 U.S. 14. Considering all the circumstances in these proceedings, particularly the expansion program now in progress at the port, and the increased amount of rail traffic to be made available at the port, we are of the opinion that the additional service of the applicants is warranted. *Gulf, M. & O. R. Co. Construction*, 271 I.C.C. 541." 307 I.C.C., at 527.

I feel that this record offers ample support in fact and law for the conclusions of the Interstate Commerce Commission quoted above.

First, exclusive rights in perpetuity to railroad business are not created by proximity and prior service, however [fol. 7246] adequate that service may have been. *Indian Valley R.R.* v. *United States*, 52 F. 2d 485, (N.D. Cal. 1931); *Pennsylvania Railroad* v. *United States*, 40 F. 2d 921 (W.D. Pa. 1930).

The Illinois Supreme Court opinion in the I.C.C. case, *Chicago, Rock Island & Pacific Railroad, et al.* v. *Illinois Commerce Commission, ex rel.*, 414 Ill. 134, 111 N.E. 2d 136

(1953), which plaintiff Rock Island relies upon so strongly, is patently not controlling precedent in relation to federal law.

Title 49 U.S.C. § 1(18) gives the Interstate Commerce Commission the right to approve extensions of rail service [fol. 7247] limited only by the requirement that there be substantial showing that "present or future public convenience and necessity" require the extension:

> "*Extension or abandonment of lines; certificates required; contracts for joint use of spurs, switches, etc.* No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad." 49 U.S.C. § 1(18).

It has long been held that provision of competition for shipper benefit was one of the considerations of public convenience and necessity available to the I.C.C. under the terms of the act. *Chesapeake & Ohio Railway Co.* v. *United States,* 283 U.S. 35 (1931); *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83 (1957).

The first of these cases phrases the matter thus:

> "In the absence of a plain declaration to that effect, it would be unreasonable to hold that Congress did not intend to empower the Commission to authorize construction of new lines to provide for shippers such competing service as it should find to be convenient or [fol. 7248] necessary in the public interest." *Chesapeake & Ohio Railway* v. *United States, supra,* at 42.

The second of these cases in interpreting the effect of the National Transportation Policy amendments of 1940 quoted this language with approval:

> "'[N]o carrier is entitled to protection from competition in the continuance of a service that fails to meet a public need, nor, by the same token, should the public be deprived of a new and improved service because it may divert some traffic from other carriers.'" *Schaffer Transportation Co.* v. *United States, supra,* at 91.

Second, in its presentation of the "stale record" argument, plaintiffs rely principally upon a single case, *Atchison, Topeka & Santa Fe Railway Co.* v. *United States,* 284 U.S. 248 (1932). (See also *State of Oklahoma* v. *United States,* 193 F.Supp. 261 (W.D. Okla., 1960)). In this case certain I.C.C. rate orders which affected the entire economic future of the railroad were based upon a record written entirely in a period prior to the happening of the major depression of the 1930's, but said orders were scheduled to become effective well after the impact of that depression. In this situation the court took judicial notice of that which no living human being in the country could fail to be aware of, [fol. 7249] and vacated the orders and granted rehearings on the changed economic circumstances.

Here the complaint is that the facts have not measured up to the predictions of increased freight tonnage moving into and out of the Port District up to the time the matter was argued before this court. It is suggested that on this ground the entire proceeding be reopened with the taking of further testimony which would show more accurately the prospect and future of this port.

As I have noted, the Commission had before it testimony of the petitioning six railroads, plus testimony presented by the two intervening railroads. The testimony presented by petitioners was distinctly optimistic in relation to the future of the Port District. The testimony presented by

the interveners in comparison was distinctly pessimistic. As I have noted, however, the I.C.C. report was *not* based on the specific estimates of the witnesses for the applicants. The significant thing is that the record fails to disclose any testimony which denies that the Lake Calumet Harbor facility proposed to be operated by the Chicago Regional Port District has a promising future with reasonable con- [fol. 7250] templation of material increases in tonnage of freight moving through it.

Under these circumstances it does not appear to me that the results of a few years of operations (which plaintiffs here seek to show) would invalidate the basic findings and conclusions entered by the I.C.C. in relation to the prospects and future of the Port District, and the question of convenience and necessity for added rail service. In my judgment the denial of rehearing was clearly within the Commission's discretion. *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946); *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503 (1944). Nor do I find any denial of due process on this issue.

Third, the major issue in this category, of course, is whether or not there is substantial evidence to support the findings of the Interstate Commerce Commission and its orders granting certificates of convenience and necessity for six additional railroads to serve this port.

Most of what has been said to this point in this opinion furnishes background and substantiation for my answer. In addition to testimony pertaining to the strategic location of the port and its prospects for future expansion of [fol. 7251] freight usage, I have referred to the expert testimony which detailed the advantages in port operation of multiple railroad service. These advantages include such major factors as single-line service and rates, multiple-line service in the event of a rail strike by one road, the vastly increased number of freight cars made available under the expanded rail service to the Port District, and the

use of the extensive additional marshaling yards made available for Port District service by the addition of the six railroads. There is established precedent for the I.C.C. to consider all of these factors as important aspects of its determination of "present or future public convenience and necessity." *Chesapeake & Ohio Railway Company* v. *United States, supra; Interstate Commerce Commission* v. *Oregon-Washington Railroad & Navigation Company,* 288 U.S. 14 (1933).

Further, it seems to be the policy of the Interstate Commerce Commission—as expressed herein and elsewhere—on a showing of public interest to make public terminal facilities generally available to all railroads which are so located as to be able to render practical service. *Atchison, Topeka & Santa Fe Railway Company Construction,* 261 [fol. 7252] I.C.C. 227 (1945); *City of Milwaukee* v. *Chicago & North Western Railway Company,* 279 I.C.C. 521 (1950).

It is interesting to note that this policy was applied in this same I.C.C. order in favor of Rock Island in relation to service to The Calumet Harbor Terminals, Inc.—a privately-owned and operated terminal adjacent to the Port District and now owned by the Pennsylvania Railroad. (See 49 U.S.C. §3(5)).

On the record taken as a whole, the orders of the Commission dated October 5, 1959, are amply supported by substantial evidence and are held to be within its statutory discretion.[4]

Second Category

As to the issues involved in the operation of the six railroads within the Port District, a recital of additional background facts is required.

In the original applications filed by the six railroads for certificates of convenience and necessity to bring their rail

[4] By so saying I specifically indicate consideration and rejection of the strained statutory construction sought by plaintiff Nickel Plate in section D.3. of its brief.

service to the Port District, as I have noted, no such certificates were requested for the operations within the boundaries of the Port District itself. It was apparently the view [fol. 7253] of the six railroads that if they were able to negotiate agreements with the Port District, this took care of the matter without any I.C.C. certificate. In its original report of October 5, 1959, however, the I.C.C. ruled that such certificates of convenience and necessity were necessary for operation of the railroads concerned within the Port District itself:

> "We are of the opinion that operation by the applicants into the Port District, as proposed, constitutes an extension of a line of railroad requiring our prior approval. . . . " 307 I.C.C. 493, 525.

The I.C.C. further ruled that supplementary applications must be filed seeking certificates of convenience and necessity for operations within the port, and reserved judgment on the unexecuted lease agreement which purported to show the general method of operation contemplated within the port until the filing of such supplementary applications.

The six railroads concerned thereupon complied, filing supplemental applications seeking certificates pertaining to operations within the port and the two intervening railroads then sought a hearing on these supplemental applications. A hearing on the supplemental applications was denied by the I.C.C.

[fol. 7254] Thereafter, as a result of negotiations between the six railroads and the Port District, an operating agreement was negotiated and executed which did not, however, correspond in several important particulars (including the economic terms) with that which had been previously authorized by the I.C.C.

On the filing of this executed agreement, the I.C.C. issued another supplemental order pointing out the variances and requiring the six railroads to file supplemental applications for permission to operate in accordance with the provisions

of the executed agreement and withholding approval until such supplemental applications were filed. Subsequently, supplemental applications were filed. The Commission thereupon entered its final supplemental order, dated November 26, 1962, which approved the operating agreement as previously negotiated and signed. It should be noted that at no time during this proceeding was there any hearing on the terms of the operating agreement. In its final order the Commission dealt with this matter in the following language:

> "In our report of September 19, 1960 [312 I.C.C. 277] we held that a hearing was not necessary for a determination of the questions at issue. We also denied a request of the Rock Island for further hearing by our order of August 23, 1962. Since the gen- [fol. 7255] eral public convenience and necessity for the applicants' operations over the Port District's tracks has been determined with only the specific terms and conditions of such operations remaining for approval, and since most of the interveners' objections to the modified agreement are actually only reiterations of their objections to the overall proposals of the applicants to serve the harbor area which have been previously discussed and disposed of in our prior reports and orders herein, we do not deem it proper to revisit upon the applicants and other parties to the proceeding the additional time and expense of a hearing upon the modified agreement." 317 I.C.C. 502, 503.

It appears to me that the Commission has taken the point of view that since it had before it a factual record which it felt provided a sufficient basis for a finding of convenience and necessity, that the six railroads should be permitted to serve the Port District, and since the plan for such service clearly calls for and implies the necessity of operation within the Port District, that, therefore, on the filing by the six railroads of appropriate supplemental ap-

plications seeking certificates of convenience and necessity for the operations within the Port District, the Interstate Commerce Commission had before it sufficient factual information from the prior hearing to approve the plan of operation thus brought to its attention.

In contending that no additional hearing was necessary in relation to this phase of the case, counsel for the I.C.C. [fol. 7256] points out that the statute does not in terms require a hearing, and argues further that the issues pertaining to the operating agreement which were settled by negotiation between the six railroads and the Port District were in the view of the I. C. C. only technicalities necessary to implement a general plan of operation as to which adequate testimony had been taken before the Commission in the original hearing.

In his argument counsel for the I.C.C. relied upon the "arm's length negotiations" between the six railroads and the Port District which resulted in the ultimate economic terms which were incorporated in the operating agreement.

Whatever might be the situation if all of the railroads interested in serving the Port District had participated in those negotiations and had signed the agreement and submitted it to the I.C.C., this is patently not the picture which we have before us. Two of the railroads with a direct and continuing interest in service to the Port District—one of which is, indeed, the only one currently serving it—obviously have tremendous economic and operating interests in the agreement negotiated between six of their competitors and the Port District without their participation.

[fol. 7257] I am not oblivious of the fact that the I.C.C. has gone to some lengths to protect certain of the interests of the plaintiffs herein. The original I.C.C. order of October 5, 1959, required a nonexclusionary redraft of the proposed operating agreement which in its original terms would have put Rock Island's continued service to the Port District entirely at the mercy of its six competitors.

But, no matter how fair its motives or how great its expertise, I doubt that such factors in a public commission

can safely be substituted for the right of a company engaged in economic competition in a proper hearing to state its own position and advance its own claims as to matters vital to its interests. Such a hearing is provided for in the act.

Moreover, it is clear that a certificate of convenience and [fol. 7258] necessity cannot stand unless it is based on findings of fact supported by substantial evidence. 5 U.S.C. § 1009(e); *Pennsylvania Railroad* v. *United States, supra; Interstate Commerce Commission* v. *City of Jersey City, supra.*

In relation to the supplemental orders of the I.C.C. to which I have referred, I do not find such substantial evidence. In fact, there is no evidentiary record at all upon which the I.C.C. approval of the detailed operating plan of the six railroads within the Port District or the economic terms of the operating agreement could be based.

I note the suggestion, of course, that the operating agreement "arrived at through arm's length bargaining" which was submitted to the I. C. C. is sufficient evidence to support the details of the operating plan, and that the necessity of some plan was clearly forecast by the volume of evidence at the first hearing.

As to the necessity for an operating plan with the Port District, I have no doubt that ample evidence was presented at the original hearing. As to the detailed operational and financial features of the agreement executed between the six railroads and the Port District, we have another matter.

[fol. 7259] The executed agreement was not evidence which could be regarded as binding upon the intervening railroads before the I.C.C. Their interests were directly affected both as to how their cars would get into and out of the Port District and as to what they would have to pay for the services. To a railroad company like Rock Island currently doing $800,000 worth of freight business in this port each year, these are hardly topics to be dismissed as matters of a technical nature only.

I think a hearing in relation to the supplemental applications referred to above should have been held—and now must be. As I have indicated, I believe this holding is demanded by statute and applicable case law. But if this were not so, I would still believe this hearing to be required in the fact situation I have outlined as a matter of fundamental fairness mandated by the due process clause of the fifth amendment.

The hearing should be limited precisely to evidence bearing directly upon the technical requirements and fairness of the operating plan within the Port District and the charges necessary to support this service. By this language [fol. 7260] I mean specifically to exclude rehearing of the basic convenience and necessity issues as to multiple rail service up to the Port District.

I appreciate that there is some inconsistency between the expressed view of the I.C.C. that these problems should be handled as a whole and my requirement of a limited hearing on the supplemental applications. Actually, there is inconsistency implicit also in the I.C.C.'s own order requiring supplemental applications and supplemental orders. This is, however, a problem of size and complexity with many ramifications. As to most of its phases (and as to all of its most important phases) there has been a thorough hearing and fair consideration. I find no logic which requires or statutory mandate or due process lack which commands, that this all be done over again.

The report and orders of the I.C.C. of October 5, 1959, are held to be amply supported by this record, and as to them the relief sought should be denied.

The supplemental orders of the I.C.C. dated September 19, 1960, August 23, 1962, and November 26, 1962, should be vacated and the case remanded for proceedings consistent with this opinion.

[fol. 7261]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

NORFOLK AND WESTERN RAILWAY COMPANY, Plaintiff,

and

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, and PULLMAN RAILROAD COMPANY, Intervening Plaintiffs,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, et al., Defendants.

JUDGMENT—April 30, 1965

This cause having been heard on the complaints of The New York, Chicago and St. Louis Railroad Company, subsequently merged into Norfolk and Western Railway Company, the Chicago, Rock Island and Pacific Railroad Company, and Pullman Railroad Company, seeking to annul, set aside and enjoin reports and orders of the Interstate Commerce Commission including those dated October 5, 1959, September 19, 1960, August 23, 1962, and November 26, 1962, in proceedings designated as Finance Docket Nos. 19538, 19448, 19742, and 19921, Illinois Central Railroad Company, et al., Construction and Trackage Rights—Lake Calumet Harbor, Cook County, Illinois, and related dockets, which reports and orders of the Commission by their terms approved, authorized, and issued certificates for trackage rights, construction and operation to and within the Chi-

[File endorsement omitted]

[fol. 7262] cago Regional Port District, Chicago, Illinois; the parties having filed briefs and having been heard through counsel on argument before this Court; the issues having been duly tried and considered, and the Court having concluded from the record that there is insufficient evidence in the record to support the Commission's determination with respect to public convenience and necessity and that due process of law had been denied plaintiffs:

It is hereby ordered and adjudged and decreed that the reports and orders of the Interstate Commerce Commission including those dated October 5, 1959, September 19, 1960, August 23, 1962, and November 26, 1962, be and they are hereby vacated and set aside in accordance with the opinion of this Court, that the Interstate Commerce Commission is hereby enjoined from enforcing such reports and orders, and that the case is remanded to the Interstate Commerce Commission for the taking of further evidence upon all of the issues raised herein.

Issued at Cleveland, Ohio, this 30th day of April 1965.

James C. Connell, Chief District Judge; Girard E. Kalbfleisch, District Judge.

[fol. 7263]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER DESIGNATING THREE JUDGE COURT—April 8, 1960

Being advised that the complaint in the above entitled cause now pending in the above district is required by Act of Congress to be heard and determined by a district court of three judges in accordance with Title 28, Sections 2284 and 2321-2325,

I hereby designate the following judges to sit upon the said court, namely: the Honorable Paul C. Weick, United States Circuit Judge, the Honorable James C. Connell, United States District. Judge, and the Honorable Girard E. Kalbfleisch, United States District Judge.

Executed at Cincinnati, Ohio, this 8th day of April, 1960.

Thomas F. McAllister, Chief Judge, United States Court of Appeals for the Sixth Circuit.

[File endorsement omitted]

[fol. 7264]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

Interveners

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, a Corporation, and PULLMAN RAILROAD COMPANY, a Corporation, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER ALLOWING ROCK ISLAND AND PULLMAN LEAVE TO INTERVENE—May 12, 1960

The motion of Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company for leave to intervene as parties plaintiff is granted and it may fully participate herein as a party litigant.

Dated this 12 day of May, 1960.

James C. Connell, United States District Judge.

[File endorsement omitted]

[fol. 7265]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

and

ILLINOIS CENTRAL RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY, CHICAGO SOUTH SHORE AND SOUTH BEND RAILROAD, THE BELT RAILWAY COMPANY OF CHICAGO, THE MICHIGAN CENTRAL RAILROAD COMPANY, THE NEW YORK CENTRAL RAILROAD COMPANY, INDIANA HARBOR BELT RAILROAD COMPANY, Defendant Interveners.

ORDER ALLOWING ILLINOIS CENTRAL, PENNSYLVANIA, SOUTH SHORE, BELT RAILWAY, MICHIGAN CENTRAL, NEW YORK CENTRAL AND HARBOR LEAVE TO INTERVENE—June 6, 1961

The motion of Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The Michigan Central Railroad Company, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company for leave to intervene as parties defen-

[File endorsement omitted]

dant is granted and they may fully participate herein as parties litigant.

Dated this 6 day of June, 1961.

Girard E. Kalbfleisch, United States District Judge.

[fol. 7266]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, et al., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER ALLOWING CALUMET HARBOR TERMINALS, ET AL. LEAVE TO INTERVENE—June 14, 1961

This cause coming on to be heard on the motion of Calumet Harbor Terminals, Inc., North Pier Terminal Company and Seaway Stevedoring Co. Inc., for leave to intervene as parties defendant, and the court having considered said motion and the answer tendered therewith, and it appearing to the court that movants should be permitted to intervene as prayed, and the court being duly advised in the premises,

It is Ordered that Calumet Harbor Terminals, Inc., North Pier Terminal Company and Seaway Stevedoring Co. Inc.,

[File endorsement omitted]

have leave to intervene in this cause and are hereby made parties hereto and may file instanter their answer to the complaints in the same manner and with like effect as if originally named a party to the cause.

Girard E. Kalbfleisch, United States District Judge.

June 14, 1961

[fol. 7267]

IN UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil No. 36018

NEW YORK, CHICAGO AND ST. LOUIS RAILROAD CO., et al., Plaintiffs,

and

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD CO., a corp., et al., Intervening Plaintiffs,

—vs.—

UNITED STATES OF AMERICA, et al., Defendants,

and

ILLINOIS CENTRAL RAILROAD COMPANY, et al., Intervening Defendants.

ORDER SCHEDULING FILING DATES, ETC.—Filed May 8, 1963

Oral argument in September, 1963, having been suggested by all counsel in the within matter, the Court hereby orders that the following be our schedule for the convenient

[File endorsement omitted]

and expeditious preparation by Counsel of the within entitled case:

(1) Plaintiff's and intervening plaintiffs' opening briefs to be filed within *45* days of the *date* of the Court's order establishing a schedule, not later than 6-24-63.

(2) Defendants' and intervening defendants' briefs to be filed within 45 days thereafter, not later than 8-8-63.

(3) Plaintiff's and intervening plaintiffs' reply briefs to be filed within 30 days thereafter, and not later than 9-7-63.

(4) Oral argument to be set for September 23, 1963, at 10:00 A.M.

[fol. 7268] Paul C. Weick, United States Circuit Judge;

Girard E. Kalbfleisch, United States District Judge;

James C. Connell, Chief Judge, U. S. District Court.

[fol. 7269]

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF OHIO

EASTERN DIVISION

Civil No. 36,018

NEW YORK, CHICAGO & ST. LOUIS RAILROAD CO.,

vs.

INTERSTATE COMMERCE COMMISSION OF THE UNITED STATES.

ORDER OF SUBSTITUTION IN THREE-JUDGE COURT—
December 23, 1963

An order of the Chief Judge of this Court having been heretofore entered designating Honorable Paul C. Weick, U. S. Circuit Judge for the Sixth Circuit, Honorable James C. Connell, Chief Judge of the U.S. District Court for the Northern District of Ohio, and Honorable Girard E. Kalbfleisch, U. S. District Judge for the Northern District of Ohio, to serve as members of the court to hear and determine the above entitled action, and for good and sufficient reasons it appearing that the Honorable George Edwards, U. S. Circuit Judge for the Sixth Circuit, be named to sit as a member of said court in place of Judge Paul C. Weick,

Now, Therefore, It Is Ordered that the designation of Paul C. Weick, U. S. Circuit Judge, to sit as a member of this three-judge court be, and it is, hereby vacated; and

As Acting Chief Judge of the U. S. Court of Appeals for the Sixth Circuit, I hereby designate Honorable George Edwards, U. S. Circuit Judge for the Sixth Circuit, to sit

[File endorsement omitted]

as a member of this three-judge court in the place and stead of Honorable Paul C. Weick.

Executed at Port Huron, Michigan, this 23rd day of December, 1963.

Clifford O'Sullivan, Acting Chief Judge, U.S. Court of Appeals for the Sixth Circuit.

[fol. 7270]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, Plaintiff,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

ORDER TO CHANGE DESIGNATION OF PLAINTIFF—November 4, 1964

Motion of Thomas O. Broker, Counsel for The New York, Chicago and St. Louis Railroad Company to change the designation of the Plaintiff to Norfolk and Western Railway Company is granted and said Norfolk and Western Railway Company may participate in the proceeding and stand in the position of The New York, Chicago and St. Louis Railroad Company.

James C. Connell, United States District Judge.

Dated: Nov. 4, 1964

[File endorsement omitted]

[fol. 7271]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

NEW YORK, CHICAGO AND ST. L. R.R. Co.,

vs.

U. S. A., et al.

DOCKET AND MINUTE ENTRIES

DATE	PROCEEDINGS
4/4/60	Complaint filed.
4/4/60	Summons issued. 3 copies of summons to the Marshal for service upon Dist. Atty., Attorney General and I.C.C.
4/11/60	Order of Chief Judge Thomas McAllister, U.S.C.A. designating Hon. Paul Weick, U.S.C.J., and Hon. J. C. Connell and Hon. G. E. Kalbfleisch, D.J. to constitute three-judge court herein filed.
4/11/60	Motion of Chicago, Rock Island and Pacific R.R. Co. and Pullman R.R. Co. to intervene as parties plaintiff filed. Copy served on U.S. (Order and complaints attached)
4/12/60	Summons ret. & filed. Served U.S. Dist. Atty. 4/5/60; served I.C.C. and Attorney General 4/7/60 per ret. receipt.
4/14/60	Supplement to complaint filed.
4/14/60	Additional summons issued re supplement to complaint. 3 copies of summons to Marshal for service upon Dist. Atty., Attorney General and I.C.C.

DATE	PROCEEDINGS
4/20/60	Supplement summons returned and filed. Served U.S. Attorney on 4/15/60; served Attorney General and I.C.C. by registered mail receipt on 4/15/60. Fees $2.00
5/20/60	Stipulation & Order granting defendants leave to answer or otherwise plead on or before August 3, 1960 filed, Connell, J. Notice waived.
8/2/60	Stipulation & Order granting defendants U.S.A. and Int. Comm. Comm. leave to answer or otherwise plead on or before Oct. 3, 1960 filed, Kalbfleisch, J. Notice waived.
9/30/60	Stipulation & Order granting the defendants U.S.A. & Int. Comm. Comm. leave to answer or otherwise plead within thirty (30) days after pltf. has filed an amended or supplemental complaint filed, McNamee, J. Notice waived.
5-4-61	Second Supplemental complaint filed. Copies mailed and delivered 5-4-61.
5/12/61	Order granting motion of Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company for leave to intervene as parties plaintiff filed, Connell, J. Copies to Broker and Ake.
5/12/61	Complaint of Chicago, Rock Island and Pacific Railroad Co. and Pullman Railroad Co. intervening plaintiffs filed.
5/12/61	Supplement to complaint of intervening plaintiffs filed.
5/12/61	Second Supplement to complaint of intervening plaintiffs filed.
5/15/61	Certificate of Service filed. Copies of complaint, supplement, and second supplement mailed 5/12/61.

DATE	PROCEEDINGS
6-1-61	Motion of Illinois Central R.R. Co., Pennsylvania R.R. Co., Chicago South Shore and South Bend R.R. Co., Belt Railway Co. of Chicago, The Michigan Central R.R. Co., The New York Central Railroad Co. and Indiana Harbor Belt R.R. Co. for leave to intervene as party defendants filed.
6-1-61	Notice by the above Railroad Companys filed.
6/6/61	Order granting motion of Illinois Central Railroad Co., Pennsylvania R.R. Co., Chicago South Shore and South Bend R.R., The Belt Railway Co. of Chicago, The Michigan Central R.R. Co., The New York Central R.R. Co. and Indiana Harbor Belt R.R. Co. for leave to intervene as parties defendant filed, Kalbfleisch, J. Copies to Ake and Broker.
6/6/61	Answer of Interveners Illinois Central; Pennsylvania; Chicago, South Shore and South Bend; The Belt Railway Co. of Chicago, The Michigan Central; The New York Central; and Indiana Harbor Belt filed. Copies mailed 6/7/61.
6/7/61	Joint Answer of U.S.A. and Interstate Commerce Commission to complaints of New York, Chicago & St. Louis R.R. Co. filed. Copies mailed 6/1/61.
6/8/61	Motion of Calumet Harbor Terminals, Inc., North Pier Terminal Co. and Seaway Stevedoring Co., Inc. for an order authorizing them to intervene filed. Copies mailed 6/7/61. (Proposed order and answer attached)
6/12/61	Answer of intervening defendants Illinois Central; Pennsylvania; Chicago, South Shore & South Bend; Belt Railway Co. of Chicago; Michigan Central; New York Central; and Indiana Harbor Belt to complaint of Chicago,

DATE	PROCEEDINGS
	Rock Island & Pacific and supplement to and second supplement to said complaint filed.
6/12/61	Certificate of Service filed. Copies mailed re above answer 6/12/61.
[fol. 7272]	
6/14/61	Order that Calumet Harbor Terminals, Inc., North Pier Terminal Co. and Seaway Stevedoring Co., Inc. are given leave to intervene as defendants and may file answer instanter filed, Kalbfleisch, J. Copies to Broker; Knachel; Guandolo; Ake and O'Brien.
6/14/61	Answer of intervening defendants Calumet Harbor Terminals, Inc., North Pier Terminal Co. and Seaway Stevedoring Co., Inc. filed. Copies mailed 6/5/61.
9-28-61	Third supplement to the complaint of Chicago, Rock Island and Pacific Railroad Co., Pullman Railroad Company, filed.
9-28-61	Certificate of service filed. Defendants served with copy of third supplement to complaint by mail on 9-28-61.
10/19/61	Answer of interveners, Illinois Central R.R. Co.: The Penna. R.R. Co.: Chicago, South Shore and South Bend R.R.: The Belt Railway Co. of Chicago: The Michigan Central R.R. Co.: The New York Central R.R. Co. and Indiana Harbor Belt R.R. Co. to Third supplement to complaint of Chicago, Rock Island & Pacific R.R. Co. filed. Copies mailed 10/18/61.
3/29/63	Third Supplement to complaint of New York, Chicago and St. Louis R.R. Co. filed.
4/3/63	Fourth Supplement to Complaint of Chicago, Rock Island and Pacific Railroad Company and Pullman Railroad Company filed.

DATE	PROCEEDINGS
4/4/63	Certificate of Service re—Fourth Supplement to Complaint filed. Copies mailed April 4, 1963.
4/5/63	Copy of letter re service on third supplement to complaint filed. Copies mailed to Myers and U.S. Atty.
4/29/63	Joint answer of U.S.A. and I.C.C. to third supplement to complaint of New York, Chicago & St. Louis R.R. Co. filed. Copies mailed 4/26/63.
5/2/63	Answers of Intervener Railroads to fourth supplement to complaint of Chicago, Rock Island and Pacific Railroad Company filed. Copies mailed 4-22-63.
5-1-63	Answers of Intervener Railroads to third supplement to complaint of New York, Chicago and St. Louis Railroad Company filed. Copies mailed 4-22-63.
5/8/63	Order of schedule for case: (1) Pltf's & intervening pltfs' opening briefs to be filed within 45 days of the date of this order, not later than 6/24/63; (2) Defts' & intervening defts' briefs to be filed with 45 days thereafter, not later than 8/8/63; (3) Pltf's & intervening pltfs' reply briefs to be filed within 30 days thereafter, and not later than 9/7/63; (4) Oral argument to be set for September 23, 1963, at 10:00 A.M. filed. Weick, Kalbfleisch & Connell, Judges. Copies to all attys.
6/20/63	Abstract of Testimony at the Hearing before the Interstate Commerce Commission in Finance Dockets 19448, 19538, 19742 & 19921 filed.
6/20/63	Brief of Chicago, Rock Island and Pacific Railroad Co. and Pullman Railroad Co. filed.
6-20-63	Certificate of service of the above brief filed. Copies mailed 6-20-63.

DATE	PROCEEDINGS
6/21/63	Brief on behalf of Plaintiff filed. Copies served 6/21/63.
6/21/63	Supplements to Brief by the Plaintiff filed. Copies served 6/21/63.
9/6/63	Reply brief of interveners in opposition to the complaints filed. Copies to all counsel.
9/9/63	Reply brief of Interveners filed. Copies mailed 9/6/63.
9/9/63	Joint brief of United States of America, and The Interstate Commerce Commission, Defendants filed. Copies mailed 9/6/63.
	• • • • • • •
9/26/63	Box containing ICC record filed. Room 111A. Shelf No. 7039
	• • • • • • •
10/4/63	Brief of pltf. in answer to reply briefs of defts. & interveners supporting defts. filed. Copies mailed 10/4/63.
10/7/63	Brief of pltfs. Chicago, Rock Island & Pacific R.R. Co. and Pullman R.R. Co. in reply to briefs of defts. & intervening defts. filed. Copies mailed 10/7/63.
12/26/63	Order that the designation of Paul C. Weick, U.S. Circuit Judge, to sit as a member of three-[fol. 7273] judge court is vacated and that the Honorable George Edwards, U.S. Circuit Judge for the Sixth Circuit, to sit as a member of this three-judge court in place of Hon. Paul C. Weick filed, Clifford O'Sullivan, Acting Chief Judge, U.S. Court of Appeals for the Sixth Circuit.
1-27-64	Minutes of proceedings filed. Hearing before the three-judge court begun and concluded. Case submitted. Edwards, Connell & Kalbfleisch jj. Thompson, r.

DATE	PROCEEDINGS
1/27/64	Box containing ICC Records received 9/26/63 sent to The Hon. C. George Edwards in two separate Boxes 1/27/64. Address 810 Federal Bldg. Detroit, Michigan.
3-20-64	Transcript of proceedings of 1-24-64 filed. Thompson, R. (mailed to the Hon. George P. Edwards.)
11/4/64	Motion for change of designation of party plaintiff filed. (Consent endorsed)
11-5-64	Order granting motion to change the designation of the Plaintiff to Norfolk and Western Railway Company and granting Norfolk and Western Railway Company to stand in the position of the New York, Chicago and St. Louis Railroad Company, filed. Connell J. (Copy to Connell, Kalbfleisch and Edwards)
4/1/65	Memorandum of Opinion filed, Connell, Kalbfleisch, Judges. (rehearing will be required upon all issues; original order of I.C.C. and supplemental orders dated 9/19/60, 8/23/62 and 11/26/62 will be vacated and case remanded for taking of further evidence) Copies to Dolan, Knachel, U.S. Atty., Marsteller.
4/1/65	Dissenting opinion of Judge Edwards filed.
4/30/65	Order that the reports & orders of the ICC including those dated 10/5/59, 9/19/60, 8/23/62 and 11/26/62, are hereby vacated & set aside, that the ICC is enjoined from enforcing such reports & orders, and that the case is remanded to the ICC for the taking of further evidence upon all of the issues raised herein filed. Connell and Kalbfleisch, Judges. Copies to Broker, O'Brien, Dwinell, Dolan, Myers, Fleming, Burk, Kadish, Wigger, Ginnane, Guandolo & U.S. Atty.

DATE	PROCEEDINGS
6/18/65	Notice of the Intervening defendants of Appeal to the Supreme Court of the United States with designation of Pleadings included filed.
6-24-65	Notice of appeal by Calumet Harbor Terminals, Inc. and North Pier Terminal Company with designation of the record filed. Copies mailed by attorney for intervening defendants, appellants, on 6-24-65.
6/29/65	Notice of appeal of U.S.A. and Interstate Commerce Commission to Supreme Court filed. Copies mailed 6/28/65.
7/8/65	Cross-designation of record to be certified of interveners-appellees Chicago, Rock Island and Pacific Railroad Co., filed. Copies served 7/8/65.

[fol. 7274]

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Date January 24, 1964.

Judges George P. Edwards, James C. Connell, Girard E. Kalbfleisch.

Reporter Roy Thompson.

Arguments of counsel.

Case submitted for consideration.

M. F. Thomas, Deputy Clerk.

[File endorsement omitted]

[fol. 7276]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., Plaintiffs,

—vs.—

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 18, 1965

I

Notice is hereby given that Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The New York Central Railroad Company, The Michigan Central Railroad Company, and the Indiana Harbor Belt Railroad Company, interveners herein, hereby appeal to the Supreme Court of the United States from the final judgment and order entered in this action on April 30, 1965.

This appeal is taken pursuant to 28 U.S.C. Sections 1253 and 2101(b).

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[File endorsement omitted]

[fol. 7293] III

The following questions are presented by this Appeal:

1. Whether the district court erred in substituting its judgment for that of the Commission's with respect to the Commission's findings—

[fol. 7294] (a)—that present and future public convenience and necessity require the construction by The Kensington and Eastern Railroad Company (K&E), the Illinois Central Railroad Company (Illinois Central), The Philadelphia, Baltimore & Washington Railroad Company (PB&W), and The Pennsylvania Railroad Company (Pennsylvania) of a line of railroad to Lake Calumet Harbor Port of Chicago;

(b) —that the acquisition of trackage rights by Illinois Central, Pennsylvania, The Chicago South Shore and South Bend Railroad (South Shore) over the line to be constructed and certain existing tracks to be consistent with the public interest;

(c) —that the acquisition of trackage rights by The Belt Railway Company of Chicago (Belt), The Michigan Central Railway Company (MC), The New York Central Railroad Company (NYC), and the Indiana Harbor Belt Railroad Company (IHB) over the aforesaid lines of railroad leading to Lake Calumet Harbor owned, operated, or to be constructed by Illinois Central, K&E, South Shore, and Pensylvania would be consistent with the public interest;

(d) —that the present and future public convenience and necessity require the operation under lease by Illinois Central, Pennsylvania, South Shore, Belt, NYC, MC, and IHB over the existing tracks of the Chicago Regional Port District at Lake Calumet Harbor.

2. Whether the district court erred in reversing the Commission's conclusions that the present and future public convenience and necessity require the construction of a line of railroad extending to Lake Calumet Harbor and that the acquisition of trackage rights over the line to be constructed, and existing tracks will be consistent with the public interest, and that the present and future public convenience and necessity require the operation under lease by applicants over the existing tracks of the Chicago Regional Port District at Lake Calumet Harbor, on the grounds that the conclusions of the Commission were not based on adequate findings and substantial evidence.

[fol. 7295] 3. Whether the district court, in reversing the order of the Commission, invaded and usurped the functions entrusted solely to the Commission of weighing and evaluating the evidence and drawing inferences therefrom as to future need for additional rail service to serve public convenience and necessity and the public interest.

4. Whether the district court erred in concluding that the Commission's exercise of discretion in its refusal to grant a hearing when a lease arrangement between appellants and the Port District for use of the latter's tracks was submitted to the Commission for approval was a denial to Nickel Plate and Rock Island of due process of law, in the light of the fact that a comparable lease had been offered in evidence at the hearing, at which time Nickel Plate and Rock Island were afforded ample opportunity to cross-examine the parties and offer evidence with respect to said lease, and particularly in view of the fact that the terms of the amended executed lease were more favorable to all the railroads, including Rock Island and Nickel Plate, than the terms of the original lease.

5. Whether the district court erred in finding the Commission erred in the exercise of its discretion in refusing to grant a further hearing on appellants' supplements to applications, in the light of the fact that said supplements were filed at the request of the Commission to cure a technical deficiency in the original applications, and in the light

of the fact that evidence in support of said supplements was already a matter of record and that the Commission had so found.

[fol. 7296] 6. Whether the district court erred, in the absence of clear evidence to support its conclusion, in finding the Commission failed to properly perform its official duties.

7. Whether the district court erred in substituting its judgment in a matter resting within the sound discretion of the Commission, i.e., whether petitions for rehearing, reconsideration, or reargument should be granted.

8. Whether the district court erred in invading the province of the Commission by passing expert judgment on the intricacies of the transportation problems involved in the litigation, particularly the important elements which must be considered in determining the public interest and whether a certificate of public convenience and necessity should issue.

9. Whether the district court erred in vacating and setting aside the reports and orders of the Commission dated October 5, 1959, September 19, 1960, and November 26, 1962, and the order of the Commission dated August 23, 1962, and enjoining the Commission from enforcing such reports and orders and remanding the case to the Commission for the taking of further evidence upon all of the issues.

William J. O'Brien, Jr., 135 East Eleventh Place, Chicago, Illinois 60605; John F. Dolan, 1324 West Third Street, Cleveland, Ohio 44113, Attorneys for Illinois Central Railroad Company, The Pennsylvania Railroad Company, Chicago South Shore and South Bend Railroad, The Belt Railway Company of Chicago, The Michigan Central Railroad, The New York Central Railroad Company, and Indiana Harbor Belt Railroad Company.

[fol. 7297] Certificate of Service (omitted in printing).

[fol. 7301]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 24, 1965

I.

Notice is hereby given that Calumet Harbor Terminals, Inc., and North Pier Terminal Company, intervening defendants in the above-entitled proceeding, hereby appeal to the Supreme Court of the United States from the final judgment and order entered herein on April 30, 1965.

This appeal is taken pursuant to 28 U.S. Code, sections 1253 and 2101(b).

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[fol. 7302]

III.

The following questions are presented by this appeal:

1. Whether the court erred in setting aside the conclusion of the Interstate Commerce Commission that Lake Calumet Harbor, Port of Chicago, now served exclusively by the Chicago, Rock Island and Pacific Railroad Company

[File endorsement omitted]

and Pullman Railroad Company (hereinafter called Rock Island), requires additional railroad service and that the present and future public convenience and necessity require the construction of a line of railroad by the Illinois Central Railroad Company, et al., and that the acquisition of trackage rights by the Illinois Central and other appli- [fol. 7303] cant railroads over the proposed line and over certain existing tracks would be consistent with the public interest.

2. Whether the court erred in concluding that the Interstate Commerce Commission was required, as a matter of due process of law, to grant a hearing to the Rock Island and The New York, Chicago and St. Louis Railroad Company (hereinafter called Nickel Plate) concerning the terms of an amended lease agreement covering the use of the tracks of the Chicago Regional Port District by all interested railroads, notwithstanding the fact that a similar lease had been offered at the hearing and Rock Island and Nickel Plate had adequate opportunity to cross-examine and present evidence relating thereto.

Charles B. Myers, 611 Field Building, Chicago, Illinois 60603; John F. Dolan, 1324 West Third Street, Cleveland, Ohio 44113, Attorneys for Calumet Harbor Terminals, Inc., and North Pier Terminal Company.

[fol. 7304] Certificate of Service (omitted in printing).

[fol. 7306]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

Civil Action No. 36018

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, ET AL., Defendants.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed June 29, 1965

I.

Notice is hereby given that the United States of America and the Interstate Commerce Commission, defendants in the above-entitled action, appeal to the Supreme Court of the United States from the final judgment and order entered in this action on April 30, 1965.

This appeal is taken pursuant to 28 U.S.C. §§ 1253 and 2101(b).

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[fol. 7307]

III.

The following questions are presented by this appeal:

1. Whether the District Court erred in concluding that there is insufficient evidence in the record to support the Commission's determination that a certificate of public con-

[File endorsement omitted]

venience and necessity should be granted to the applicants to operate up to the Chicago Regional Port District;

2. Whether the District Court erred in concluding that there is insufficient evidence in the record to support the Commission's determination that a certificate of public convenience and necessity should be granted to the applicants to operate within the Port District;

3. Whether the District Court erred in concluding that plaintiffs were denied due process of law by the Commission's denial of a further hearing as to the terms and effect of the final agreement between the applicants and the Port District concerning operations within the Port District;

4. Whether, assuming *arguendo* that a further hearing is required as to the terms and effect of the final agreement between the applicants and the Port District concerning operations within the Port District, the District Court erred in further concluding that a "complete rehearing" [fol. 7308] is required "upon all of the issues", and, specifically, upon the over-all issue of public convenience and necessity for applicants' service to the Port District.

Dated June 28, 1965

Robert L. Wright, Acting Assistant Attorney General; John H. D. Wigger, Attorney, Department of Justice, Washington, D. C. 20530; Merle M. McCurdy, United States Attorney, Northern District of Ohio, Cleveland, Ohio, Attorneys for the United States of America.

Robert W. Ginnane, General Counsel; Robert S. Burk, Attorney, Interstate Commerce Commission, Washington, D. C. 20423, Attorneys for the Interstate Commerce Commission.

[fol. 7309] Proof of Service (omitted in printing).

[fol. 7324]

SUPREME COURT OF THE UNITED STATES

Nos. 445, 484 and 543—October Term, 1965

ILLINOIS CENTRAL RAILROAD COMPANY, ET AL., Appellants,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

CALUMET HARBOR TERMINALS, INC., ET AL., Appellants,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL., and

UNITED STATES and INTERSTATE COMMERCE COMMISSION, Appellants,

v.

NORFOLK AND WESTERN RAILWAY COMPANY, ET AL.

ORDER NOTING PROBABLE JURISDICTION—November 15, 1965

Appeals from the United States District Court for the Northern District of Ohio.

The statements of jurisdiction in these cases having been submitted and considered by the Court, probable jurisdiction is noted. The cases are consolidated and a total of two hours is allotted for oral argument.